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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

## No. 77-742

**JEROME MILLER, individually and as Director of THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES and THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES of the STATE OF ILLINOIS,**

*Appellants,*

VS.

**MARCEL YOUAKIM and LINDA YOUAKIM, individually and as foster parents; TIMOTHY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM; MARY LOU ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM; LARRY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM; and SHERRY ROBERTSON, by her sister and next friend LINDA YOUAKIM; and all others similarly situated,**

*Appellees.*

On Appeal from the United States Court
of Appeals for the Seventh Circuit

## BRIEF OF APPELLEES

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**JEROME MILLER, individually and as Director of THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES and THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES of the STATE OF ILLINOIS,**

*Appellants,*

vs.

**MARCEL YOUAKIM and LINDA YOUAKIM, individually and as foster parents; TIMOTHY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM; MARY LOU ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM; LARRY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM; and SHERRY ROBERTSON, by her sister and next friend LINDA YOUAKIM; and all others similarly situated,**

*Appellees.*

**On Appeal from the United States Court of Appeals for the Seventh Circuit**

# BRIEF OF APPELLEES

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED†

U.S. Const. art. VI, cl. 2, the Supremacy Clause**

Social Security Act of 1935, Title IV, 49 Stat. 627, as amended:

Section 401, 42 U.S.C. § 601 (1970)
Section 402(a)(10), 42 U.S.C. § 602(a)(10) (1970 & Supp. V 1975)**
Section 402(a)(19)(F), 42 U.S.C. § 602(a)(19)(F) (1970 & Supp. V 1975)**
Section 402(a)(20), 42 U.S.C. § 602(a)(20) (1970 & Supp. V 1975)
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ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES, CHILD WELFARE MANUAL 2.8.2 (1976)**

† All constitutional provisions, statutes and regulations involved are reproduced in the Supplement to Brief and Argument for Appellants, except for those marked by a single asterisk, which are reproduced in the Appendix, and those marked by a double asterisk, which are reproduced in the Supplement hereto.



## QUESTION PRESENTED

**DOES THE ILLINOIS POLICY OF DENYING AFDC-FOSTER CARE ELIGIBILITY TO OTHERWISE ELIGIBLE FOSTER CHILDREN SOLELY BECAUSE ILLINOIS PLACES THEM IN THE HOMES OF RELATIVES VIOLATE THE SOCIAL SECURITY ACT, SECTION 408 AND THUS U.S. CONST. ART. VI, CL. 2, THE SUPREMACY CLAUSE?**

## STATEMENT OF THE CASE

### I. THE AFDC-FOSTER CARE PROGRAM

The Aid to Families with Dependent Children-Foster Care ("AFDC-Foster Care" or "Foster Care") Program, Social Security Act, Section 408, 42 U.S.C. § 608 (1970), is one of the federal-state categorical public assistance programs under the Social Security Act of 1935, as amended (the "Act"). In 1961, when the Foster Care Program was enacted, Act of May 8, 1961, Pub. L. No. 87-31, § 2, 75 Stat. 76, participation was optional for states participating in the basic Aid to Families with Dependent Children ("AFDC") Program, Section 406, 42 U.S.C. § 606 (1970 & Supp. V 1975).[1] Since July 1, 1969, states participating in the basic AFDC program must have a Foster Care Program. Section 402(a)(20), 42 U.S.C. § 602(a)(20).

The Foster Care Program provides cash payments and specialized social services to eligible foster children. Foster children receive substantially higher money benefits than children receive under the basic AFDC program. Illinois, for example, pays from $105 to $150

[1] All citations to the United States Code are to Supp. V (1975) to the 1970 edition, unless otherwise indicated.

monthly in Foster Care on behalf of an eligible child. DEPARTMENT OF CHILDREN AND FAMILY SERVICES ("DCFS"), CHILD WELFARE MANUAL 4.1.1(B). It pays a maximum of $69 monthly for each child eligible for the basic AFDC program. ILLINOIS DEPARTMENT OF PUBLIC AID, AFDC CATEGORICAL ASSISTANCE MANUAL PR-615. Comparable differentials between Foster Care benefits and basic AFDC benefits have prevailed in all participating states since the establishment of the Foster Care Program. *See* n.13, *infra*. Moreover, under Section 408, the states must provide specialized intensive services to AFDC-Foster Care children and their parents and must assure that the foster homes in which these children live meet state qualitative licensing standards for suitable foster placements. *See* pp. 22, 27-31, *infra*. Children in the basic AFDC program are ineligible for these special services, and their homes need not meet such standards.

One of the federal eligibility requirements for the AFDC-Foster Care Program is that the otherwise eligible foster child be placed in a "foster family home." Section 408(a)(3), 42 U.S.C. § 608(a)(3) (1970). Under ILL. REV. STAT. ch. 23, §§ 2212.05, 2212.17 and 5005 (Supp. 1977), the appellant state official (the Director of the Illinois Department of Children and Family Services) and DCFS who administer the Foster Care Program in Illinois, deny Foster Care eligibility to those otherwise eligible children whom the state officials place in the home of non-legally responsible relatives of those children. Appellants contend that such a home is not a "foster family home" within the meaning of Section 408.



## II. THE ROBERTSON FOSTER CHILDREN

Timothy Robertson, Mary Lou Robertson, Larry Robertson and Sherry Robertson are brothers and sisters. (A. 7-8, 58).[2] In 1969, all four children were judicially removed from their mother's home upon a finding of neglect, and made state wards. (A. 7, 10-11, 58).

As state wards, the Robertson children were the responsibility of the Illinois Department of Children and Family Services, and from 1969-1972, DCFS placed them in various homes of strangers and in child care institutions, *i.e.*, orphanages. (A. 10-11, 58). So long as the Robertson children resided in such unrelated foster homes, or in orphanages, DCFS deemed them eligible for the AFDC-Foster Care Program, and paid full AFDC-Foster Care benefits on their behalf. (A. 11, 58).

In 1972, however, DCFS decided to place Timothy in the home of Marcel Youakim and his wife Linda. (A. 11, 58). Linda Youakim is the older sister of the Robertson children. (A. 7-8, 58). Neither Marcel nor Linda Youakim was under any legal obligation to accept this placement or to support Timothy financially. *See* ILL. REV. STAT. ch. 23, § 10-2 (Supp. 1977).

Under ILL. REV. STAT. ch. 23, § 2217 (Supp. 1977) and the DCFS PLACEMENT MANUAL, ch. 3, Pt. V (IV) (1972), (A. 38), DCFS was required to assure that the Youakim home met the licensing standards established for foster

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[2] The following designations are used to refer to the Appendix and Statutory Supplements filed with this Court, in which material cited herein can be found:

"A."—Appendix
"State Supp."—Supplement to Brief and Argument for Appellants
"Appellees' Supp."—Supplement to Brief of Appellees.

family homes, as defined in ILL. REV. STAT. ch. 23, § 2212.17 (Supp. 1977), before placing Timothy there. Accordingly, DCFS officials inspected the Youakim home and approved it as meeting the standards for the care of the "foster child . . . Timothy Robertson." (A. 11, 20-23).

This approval was incorporated in a "Home Placement Agreement" which the Youakims signed. (A. 20-23). Aside from approving the Youakims' home as a foster care home, the agreement provided for periodic visits by DCFS counselors to assist the family in planning for Timothy. (A. 21). The Agreement was identical to the agreement governing licensing of and placement in AFDC-Foster Care homes maintained by non-relatives, with three exceptions: (1) The word "foster" was crossed out at some, but not all, points; (2) two references to the Youakims' relationship to the children were included; and (3) DCFS's usual promise of Foster Care benefits was deleted. (A. 12, 20-23, 58).

DCFS had placed Mary Lou in several foster homes of strangers, and in orphanages, since she had been removed from her mother's home. (A. 12, 58). After DCFS placed Timothy in the Youakims' home, DCFS employees decided that placement of Mary Lou in that home would also be appropriate. (A. 12, 58). Accordingly, they approved the Youakim home for placement of Mary Lou also, and the Youakims and DCFS entered into another Home Placement Agreement. (A. 12, 58).

At the time Timothy was placed in the Youakims' home, DCFS employees denied the Youakims AFDC-Foster Care benefits for his care, because Linda was related to him. (A. 11, 14, 58). After Mary Lou was placed in the Youakims' home, DCFS refused to make AFDC-Foster Care payments on her behalf as well. (A. 12-14, 58).



The Youakims, at the suggestion of a DCFS caseworker, applied on the children's behalf to the Illinois Department of Public Aid for basic AFDC benefits. (A. 14-15, 58). Basic AFDC benefits were granted on behalf of both children. The total amount of these benefits for both children was $123.04, over $85.00 a month less than the AFDC-Foster Care benefits that would have been paid on the children's behalf if they had been placed in the home of a non-relative. (A. 14-15, 58).

From the time of Timothy and Mary Lou's placement in their home, the Youakims personally supported these children. In doing so they incurred personal expenses substantially in excess of basic AFDC benefits they were receiving on behalf of Timothy and Mary Lou, and also in excess of the benefits they would have received had DCFS authorized Foster Care benefits. (A. 14, 58). For this reason, and because DCFS would not pay AFDC-Foster Care benefits on behalf of the remaining two Robertson children, Sherry and Larry, the Youakims were unable to accept Sherry and Larry as foster children. (A. 14, 58). Placing Larry and Sherry in the Youakim home would have reunited the four Robertson children for the first time since 1969. Larry remained in an orphanage, and Sherry in a foster family home of strangers. (A. 14, 58).

## III. THE PROCEEDINGS TO DATE

The four Robertson foster children and the Youakims filed their second Amended Complaint in January, 1974. (A. 5). The action was brought under 42 U.S.C. § 1983, as a class action pursuant to FED. R. CIV. P. 23(a) and (b)(2). (A. 10). Plaintiffs ("the foster children") challenged the Illinois statutory policy denying Foster Care benefits to otherwise eligible children solely because the state placed them in homes of relatives. (A. 16-19).

The state officials moved to dismiss the complaint for failure to state a claim. (A. 41). A three-judge court certified a plaintiff class of foster children and held that "[t]he Illinois scheme does not deny plaintiffs equal protection of the laws." 374 F.Supp. 1204, 1210 (N.D. Ill. 1974).

The foster children appealed to this Court. The Jurisdictional Statement raised, for the first time, the claim that the challenged Illinois statutory policy violated Social Security Act Section 408, 42 U.S.C. § 608 (1970). This Court noted probable jurisdiction. 420 U.S. 970 (1975).

On March 21, 1976 this Court issued a *per curiam* opinion, *Youakim v. Miller*, 425 U.S. 231 (1976), vacating the decision of the three-judge court and remanding the case for consideration of the foster children's statutory claim in light of, *inter alia*, an HEW Program Instruction supporting that claim. The District Court subsequently issued a Memorandum Opinion granting the foster children's motion for summary judgment, and entered a final Judgment and Order on that Opinion. 431 F.Supp. 40 (N.D. Ill. 1976) and Jurisdictional Statement, Appendix C. The Opinion and Final Judgment, *inter alia*, (1) certified a plaintiff class of otherwise eligible foster children; and (2) declared that ILL. REV. STAT. ch. 23, §§ 2212.05, 2212.17 and 5005, insofar as they denied AFDC-Foster Care benefits and services to otherwise eligible foster children living in the homes of relatives, violated Sections 401 and 408, 42 U.S.C. §§ 601 and 608 (1970).

A unanimous Court of Appeals affirmed the Judgment of the District Court. 562 F.2d 482 (7th Cir. 1977).

The state officials filed a timely Jurisdictional Statement. This Court noted probable jurisdiction. 98 S.Ct. 1230 (1978).



## SUMMARY OF ARGUMENT

I. Section 408 defines the children who are eligible for the Foster Care Program. The states are not free to restrict this federal definition of eligibility, in the absence of a clear indication that Congress meant the coverage to be optional. *Carleson v. Remillard*, 406 U.S. 598 (1972); *Townsend v. Swank*, 404 U.S. 282 (1971); *King v. Smith*, 392 U.S. 309 (1968). The constitutional foundation for this rule is U.S. CONST. art. VI, cl. 2, the Supremacy Clause. The rule's statutory foundation is Section 402(a)(10), *see Quern v. Mandley*, 46 U.S.L.W. 4594, 4598 (June 6, 1978), which applies to the Foster Care Program.

II. The Illinois statutory policy of denying Foster Care eligibility to otherwise eligible children solely because the state places them in the homes of relatives, unlawfully restricts the federal definition of eligibility in Section 408. Congress meant a foster family home to be *any* home meeting state qualitative standards for a home providing care for a foster child. Relative homes meeting such standards are included within the federal definition; the state's policy of denying Foster Care eligibility to an otherwise eligible child it places in such a home, on the grounds that such a home is not a "foster family home," Section 408(a)(3), is therefore unlawful.

A. A primary purpose of the AFDC program is to encourage the care of dependent children in their own home or in the homes of relatives, and thereby "to help maintain and strengthen family life." Section 401.

B. The overriding purpose of the Foster Care Program is to help assure that neglected and abused children removed from their own homes by state action

receive the most suitable available care outside their homes, appropriate to their special needs. For the class of neglected AFDC children judicially removed from unsuitable homes and placed in the care of the appropriate state welfare agency, Congress requires proper placement efforts, supervised by the state agency. It requires that the "foster family home" in which an eligible child is placed meet state-defined standards governing its suitability as a foster child placement. From its inception, the program has provided substantial additional cash money payments and specialized services not provided under the basic program.

C. Section 408 sets forth a statutory definition of a "foster family home":

> [T]he term "foster family home" means a foster family home for children which is licensed by the State . . . or has been approved . . . as meeting the standards established for such licensing.

If the (relative) homes in which the children here are placed meet this statutory definition, then the children here are eligible for AFDC-Foster Care.

The licensing or approval requirement was included to assure that the homes in which the state placed eligible children would meet minimum state qualitative standards. Illinois regularly places otherwise eligible foster children in the homes of relatives which must be and are, under state policy, regularly approved as meeting such standards. Therefore, in the absence of a Congressional intent simply to exclude the home of a relative of an otherwise eligible foster child from the statutory understanding of the term "foster family home," Illinois has itself brought such homes within the express statutory definition of that term, and otherwise eligible children placed in such homes within the federal definition of Foster Care eligibility.



D. Congress had no such intent to exclude the homes of relatives of otherwise eligible foster children. Section 408 and related provisions of the Act, read in light of the objects and policies of the Foster Care Program, demonstrate that Congress meant to require Foster Care coverage for an otherwise eligible foster child the state placed in *any* home meeting state qualitative standards, including the home of a child's relative.

1. The adjective "foster," whatever it modifies, commonly denotes non-parental care of a child by a relative, as well as non-relative care. Furthermore, Congress' central concern, under the Foster Care Program, with helping to assure the most suitable placement for neglected children removed from their own homes—in the context of a remedial program designed to meet these children's special needs—is convincing evidence that a restrictive definition of "foster family home" would only subvert Congress' intent.

2. Section 408(b) provides that coverage of foster care shall include care "in the foster family home of any individual."

Congress' choice of the word "any" demonstrates the absence of any intent to exclude *a priori* any class of individuals as potential foster parents (or any class of homes meeting state qualitative standards as potential "foster family home[s]").

3. "[I]n the absence of an unmistakable directive," this Court will not construe a federal statute "in a manner which runs counter to the broad goals which Congress intended it to effectuate." *FTC v. Meyer*, 390 U.S. 341, 349 (1968). In reading "foster family home" to exclude relative homes, the state attributes to Congress, in one subsection of Section 408(a), an intent to legislate *sub silentio* significantly different treatment to two classes of children identically situated as to need, in a

program structured precisely to assist the states to meet that common need for special care and protection. The state also attributes to Congress an intent to discourage family care of dependent children, the care it has always judged most suitable for them, in a program established to assist the states to provide the most suitable care to dependent neglected children judicially removed from their homes.

4. Section 402(a)(19)(F)(i) provides that if a caretaker relative refuses to cooperate in the AFDC Work Incentive Program ("WIN"), AFDC payments to her shall be terminated, but that aid for "any dependent child in the family" shall be continued in the form of protective payments or Foster Care payments under "Section 408." This provision can only have been directed at one or both of two possible situations, either of which incorporates an explicit Congressional recognition of the home of a relative as a "foster family home."

III. Coverage of children living with relatives under the Foster Care Program does not duplicate coverage available under the basic AFDC program. Eligibility for Foster Care is defined by additional eligibility criteria, and provides a distinct set of benefits and services tailored to meet the special needs of neglected, exploited, or abused wards of the state.

IV. The construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. Here, the Department of Health, Education and Welfare's relevant interpretation of Section 408 is clear, unequivocal, and wholly supports the foster children's position.



## ARGUMENT

### ILLINOIS' DENIAL OF AFDC-FOSTER CARE ELIGIBILITY TO OTHERWISE ELIGIBLE FOSTER CHILDREN SOLELY BECAUSE IT PLACES THEM IN THE HOMES OF RELATIVES VIOLATES SECTION 408 OF THE SOCIAL SECURITY ACT AND THUS U.S. CONST. ART. VI, CL. 2, THE SUPREMACY CLAUSE.[3]

### I.

### INTRODUCTION.

Section 408 defines the children who are eligible for the Foster Care Program. The states are not free to restrict this federal definition of eligibility, in the absence of a clear indication that Congress meant the coverage to be optional. *Carleson v. Remillard*, 406 U.S. 598 (1972); *Townsend v. Swank;* 404 U.S. 282 (1971); *King v. Smith*, 392 U.S. 309 (1968). *See Burns v. Alcala*, 420 U.S. 575 (1975).[4] The constitutional foundation for this rule is U.S. CONST. ART. VI, cl. 2, the Supremacy

[3] Supreme Court Rule 15(c) provides that "only the questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the court." *See Phillips Chemical Co. v. Dumas Independent School Dist.*, 361 U.S. 376, 386 (1960). Moreover, this Court ordinarily will not consider questions not raised in or decided by the Court of Appeals. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 (1970). On remand from this Court's decision vacating the original three-judge court decision herein, neither party proceeded on the equal protection question originally presented, (A. 44, 57), and neither the District Court nor the Court of Appeals addressed that question. Appellants' Jurisdictional Statement makes no reference to this constitutional question as being presented here. For these reasons, the constitutional question originally before the Court on the first appeal is not now before it; only a statutory question is presented.

[4] "*King, Townsend*, and *Carleson* establish . . . that once the federal standard of eligibility is defined, a participating State may not deny aid to persons who come within it in the absence of a clear indication that Congress meant the coverage to be optional." *Burns v. Alcala*, 420 U.S. 575, 580 (1975).

Clause. *Carleson, Townsend, King.* The rule's statutory foundation is Section 402(a)(10), which provides that "aid to families with dependent children shall be furnished . . . to *all* eligible individuals" (emphasis added). *See Quern v. Mandley,* 46 U.S.L.W. 4594, 4598 (June 6, 1978). Since "foster care" under the Foster Care Program is defined as "aid to families with dependent children," Section 408(b), the mandate of Section 402(a)(10) applies to the Foster Care Program. Section 408(e) independently provides that federal funding of any foster care under Section 408 is predicated on the State AFDC plan "includ[ing] aid for *any* child described in paragraph (a) of this section [408]" (emphasis added). Section 408(e) is a statutory parallel to Section 402(a)(10).

The Illinois policy of denying Foster Care eligibility to otherwise eligible children, solely because the state places them in the homes of relatives, unlawfully excludes children who come within the federal definition of eligibility in Section 408. As shown *infra,* under Section 408 a foster family home is *any* home meeting state qualitative standards for a home providing care for a foster child. The home of a relative meeting such standards, such as the Youakims' home, is included within the federal definition, and the state's policy of denying Foster Care eligibility to children it places in such a home, on the grounds that such a home is not a "foster family home," Section 408(a)(3), is therefore unlawful.

There is no more persuasive evidence that section 408 defines "foster family home" and Foster Care eligibility so as to make the children here eligible, than the words Congress chose to express its intentions in Section 408 itself. *See Perry v. Commerce Loan Co.,* 383 U.S. 392, 400 (1966). Indeed, the Court of Appeals found its decision compelled by "the plain meaning of the federal



statute." *Youakim,* 562 F.2d at 486. Section 408 cannot, of course, be read in a vacuum. The meaning of a statute must be discerned by "look[ing] to the provisions of the whole law, and to its object and policy." *Philbrook v. Glodgett,* 421 U.S. 707, 713 (1975) quoting *United States v. Heirs of Boisdoré,* 49 U.S. (8 How.) 113 (1849). Here that "whole law" includes at least the immediate statutory environment in which Section 408 was enacted, as well as Section 408 itself. *See Kokoszka v. Belford,* 417 U.S. 642, 650 (1974); *King v. Smith,* 392 U.S. 309, 316-329 (1968). Thus it is appropriate to review briefly the objects and policies of the regular AFDC program, as well as of the Foster Care Program itself, before discussing why Section 408 invalidates the Illinois policy at issue. The next three sections review these objects and policies.

## II.

## THE OBJECTS AND POLICIES OF THE AFDC PROGRAM.

The original focus of the AFDC program was to maintain and strengthen family life by providing benefits for the support of dependent children in needy families. *Burns v. Alcala,* 420 U.S. 575, 581-82 (1975). These benefits were designed to allow mothers to remain home to care for their children; the practice of institutionalizing needy children would thereby be avoided. *Id.,* citing S. REP. No. 628, 74th Cong., 1st Sess. 16-17 (1935); H. R. REP. No. 615, 74th Cong., 1st Sess. 10 (1935).

Congress has often amended the Act to further advance the goal of preserving family life and to emphasize its importance. Assistance had originally been extended only to the dependent child. In 1950, Congress amended Section 406(b) to permit assistance to be extended to the caretaker relative as well. Act of

August 28, 1950, ch. 809, § 323, 64 Stat. 551, 42 U.S.C. § 606(b). The House Committee Report linked the amendment to the goal of preserving family life. H. R. REP. No. 1300, 81st Cong., 1st Sess. 46 (1949). The 1956 amendments to the Act, Act of August 1, 1956, ch. 836, § 312(a), 70 Stat. 848, amended Section 401 to state specifically that a primary purpose of the AFDC program was to "encourag[e] the care of dependent children in their own homes or in the homes of relatives," and thereby "help to maintain and strengthen family life."

Congress further sought to strengthen family life by establishing the AFDC-Unemployed Parent Program ("AFDC-U"), Act of May 8, 1961, Pub. L. No. 87-31, § 1, 75 Stat. 75, 42 U.S.C. § 607, in the same act which established the AFDC-Foster Care Program. Since the inception of the basic AFDC program, eligibility for benefits had been predicated on the "death, . . . absence . . . or . . . incapacity" of one or both parents. Section 406(a), 42 U.S.C. § 606(a). These eligibility criteria had created an incentive for one of the parents, usually the father, to leave the home in order to make the spouse and children eligible for benefits. In the AFDC-U Program, Congress acted to remove this incentive to family disintegration, by permitting eligibility for AFDC to be based on the unemployment of a parent. Its intent was to strengthen the family unit in the child's own home by allowing the father to remain in the home. 107 CONG. REC. 3765 (1961) (Remarks of Rep. Baldwin); 107 CONG. REC. 3768 (1961) (Remarks of Rep. McCormack); 107 CONG. REC. 3770 (1961) (Remarks of Rep. Ullman).

From the inception of the program, Congress recognized that "family life" for the child included the extended family. Section 406(a). Most eligible children lived with one or both parents. But a child whose



parents were dead or unable or unfit to care for him remained eligible for the program if non-legally responsible relatives agreed to care for him in their home. Sections 406(a), 406(c). Relatives, however, often had other obligations which precluded their undertaking such a task. As early as 1947 the Social Security Board (Bureau of Public Assistance), which then administered the AFDC program, stated:

> A child's relative, even though seemingly well-to-do, may have other obligations with prior claim on his income and resources. He may have children of his own to support; he may have assumed responsibility for the support of other needy relatives; or he may, under the necessity of securing his own future and that of his dependents, have obligated all resources above those required for his and their day-to-day responsibilities. In such circumstances a relative, even though deeply concerned for the welfare of the needy child, naturally hesitates to offer a home if by so doing he must jeopardize these other obligations.

HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION § 3435.3 (1947)[5]

## III.

## THE ESTABLISHMENT OF THE AFDC-FOSTER CARE PROGRAM.

In *King v. Smith*, 392 U.S. 309 (1968), this Court reviewed the origin of the Foster Care Program in HEW's and Congress' response to state AFDC "unsuit-

[5] Hereinafter cited as "HANDBOOK." The HANDBOOK, where applicable, is the official interpretative guide to Department of Health, Education and Welfare Policy. *Cf. King v. Smith*, 392 U.S. 309, 317 (1968). It incorporates, *inter alia*, previous "State Letters" and informational memoranda which HEW's predecessor agency, the Social Security Board, issued to state agencies. The bulk of the HANDBOOK has been superseded by the Code of Federal Regulations. Thus, §§ 3400-3499, including § 3435 of the HANDBOOK, were superseded by the regulations published at 36 Fed. Reg. 3868 (1971).

able home provisions." Under such provisions, a state would typically declare a home unsuitable and cut off all AFDC benefits, thus impoverishing the dependent children still further, while making no effort to improve conditions in the home or to locate a "suitable" alternative home. *King v. Smith*, 392 U.S. at 321-25.

In response to such provisions, HEW Secretary Flemming, on January 17, 1961 issued State Letter No. 452, later known as the Flemming Ruling. It provided that as of July 1, 1961:

> A State plan . . . may not impose an eligibility condition that would deny assistance with respect to a needy child on the basis that the home conditions in which the child lives are unsuitable, while the child continues to reside in the home. Assistance will therefore be continued during the time efforts are being made either to improve the home conditions or to make arrangements for the child elsewhere.

The Flemming Ruling furthered the AFDC program goals of maintaining and strengthening family life and meeting the needs of the dependent child. The ruling stated:

> *It is of great importance* that State agencies should be concerned about the effects on children of the environment in which they are living and *that services be provided which will be directed toward affording the children maximum protection and strengthening their family life.*

*Id.* (emphasis added). By requiring that assistance continue while efforts were made "either to improve the home conditions or to make arrangements for the child elsewhere," the Ruling recognized that there were unsuitable home situations in response to which remedial measures "should be taken."

After HEW prohibited "unsuitable home" provisions in the Flemming Ruling, Congress passed Section



404(b), Act of May 8, 1961, Pub. L. No. 87-31, § 4, 75 Stat. 77, 42 U.S.C. § 604(b) (1970). Section 404(b) approved HEW denials of federal funds to states enforcing provisions that denied aid to children living in unsuitable homes after September 1, 1962.[6] But that provision did nothing to respond to the needs of children living in truly unsuitable homes for whom a state should "make arrangements . . . elsewhere," as the Flemming Ruling suggested might be appropriate. To assure such children the most suitable alternative placement, Congress passed an Administration-proposed bill establishing on a temporary basis the AFDC-Foster Care Program. Act of May 8, 1961, Pub. L. No. 87-31 § 2, 75 Stat. 76, 42 U.S.C. § 608 (1970). *Public Welfare Amendments of 1962: Hearings on H. R. 10032 Before the House Ways and Means Committee*, 87th Cong., 2nd Sess. 294-97, 305-7 (Testimony of HEW Secretary Ribicoff and HEW Undersecretary Cohen); *Public Assistance Act of 1962: Hearings on H. R. 10606 Before the Committee on Finance*, 87th Cong., 2d Sess. 65 (1962) (Memorandum of Secretary Ribicoff to Sen. Byrd).[7] The Foster Care Program was a Congressional response to the Flemming Ruling and the problems it recognized. *See King v. Smith*, 392 U.S. 309, 323 (1968).

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[6] By extending the time for complying with the Flemming Ruling to September 1, 1962, Congress recognized that not all state legislatures would have a legislative session before July 1, 1961, and thus an opportunity to amend their state "suitable home" laws to conform to the Flemming Ruling. S. REP. No. 165, 87th Cong., 1st Sess. 6, (1961).

[7] "The first two of these provisions [AFDC-Unemployed Parent and AFDC-Foster Care] were proposed by the administration last year as a temporary measure to deal with emergency situations which had arisen in the country. The administration asked for the approval of this legislation on a temporary basis pending a complete study of the public welfare programs and a development of a comprehensive plan for their improvement." *Public Assistance Act of 1962: Hearings on H.R. 10606 Before the Committee on Finance*, 87th Cong., 2d Sess. 65 (1962).

## IV.

## THE OBJECTS AND POLICIES OF THE AFDC-FOSTER CARE PROGRAM.

Congress defined an eligible "dependent child" for purposes of the new Foster Care Program in Section 408(a) as a child who met the Section 406(a) definition of eligibility but who then:

(1) was removed from the home of his caretaker relative, after April 30, 1961, "as a result of a judicial determination to the effect that continuation therein would be contrary to [his] welfare," Section 408(a)(1), 42 U.S.C. § 608(a)(1) (1970);

(2) was placed in the care of the state agency administering the AFDC program,[8] Section 408(a)(2), 42 U.S.C. § 608(a)(2) (1970);

(3) was placed in a foster family home as a result of such a judicial determination,[9] Section 408(a)(3), 42 U.S.C. § 608(a)(3) (1970); and

(4) had been receiving AFDC in the home from which he was judicially removed in the month in which the court proceedings leading to this determination were initiated,[10] Section 408(a)(4), 42 U.S.C. § 608(a)(4) (1970).

These eligibility requirements were congruent with Congress' broadly stated purpose under the Program to "stimulate and assist the states in the protection and care of children." S. REP. No. 165, 87th Cong., 1st Sess. 7 (1961).

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[8] Amended in 1962 to authorize other state agencies to have responsibility for the placement and care of the child, under certain narrow conditions.

[9] Amended in 1962 to permit placement in a child care institution. *See* pp. 24-5, 39-40, *infra.*

[10] Amended in 1967 to include children eligible for AFDC in the month that judicial proceedings began, or six months prior thereto. *See* pp. 60-62, *infra.*



In the few years immediately preceding the enactment of the Foster Care Program, some states had adopted procedures under which AFDC mothers deemed to be maintaining unsuitable homes were coerced, under threat of formal neglect proceedings, to "voluntarily" place their children with relatives. W. BELL, AID TO DEPENDENT CHILDREN 124-36 (1965). To eliminate such practices under the Foster Care Program, and to protect children (and their parents) alleged to be living in unsuitable homes from unwarranted sanctions, Congress required that an eligible child could be removed from his home only by a "judicial determination" that his home was unsuitable. Section 408(a)(1).[11]

The focus of the program was thus on children who were judicially removed from their homes because of unsuitable conditions, and on "develop[ing] the most suitable care for children who have to be provided for outside their own homes." 107 CONG. REC. 6388 (1961) (Remarks of Sen. Byrd).

The few children[12] who had to be removed from their homes because of abuse or neglect shared a different and greater need than was met under the basic AFDC program. In the basic program, "need" is a loss of *economic* support because of the "death," "absence" or "incapacity" of the parents. Section 406(a). S. REP. No. 628, 74th Cong., 1st Sess. 17 (1935); H. R. REP. No. 615, 74th Cong., 1st Sess. 10 (1935). Although under Section

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[11] *See Social Security Amendments of 1967: Hearings on H.R. 12080 Before the Comm. on Finance, United States Senate,* 90th Cong., 1st Sess. 167 (1967) (Statement of Undersecretary Cohen); 108 CONG. REC. 12693 (1962) (Remarks of Sen. McCarthy).

[12] *See* 108 CONG. REC. 13562 (1962) (Remarks of Sen. McCarthy), citing a Children's Bureau estimate that only about 1% of AFDC children were victims of such neglect as to make them eligible for Foster Care.

408(a)(4), to be eligible for Foster Care, children must be, or recently have been, eligible for AFDC, the factor triggering Foster Care eligibility is not economic need. Rather, eligibility under Section 408(a)(1) is predicated on the special needs of children who have been so neglected or mistreated in their own homes, that a court has ordered them removed from those homes. The "home environments" of all such children had been "clearly contrary to [their] best interests." S. REP. No. 165, 87th Cong., 1st Sess. 6 (1961); *see also* 108 CONG. REC. 12563 (1962) (Remarks of Sen. Keating).

To assure that these neglected and abused children would be provided with the most suitable available placement outside their own homes, Congress required that the state welfare agency supervise the placement of an eligible child. Section 408(a)(2). More importantly, it defined the "foster family home" in which the state would be required to place an eligible child under Section 408(a)(3) as one licensed or meeting state licensing standards as a home suitable to provide Foster Care. Section 408, last paragraph. Under the Foster Care Program, therefore, the states were to define the qualitative criteria governing suitable placement for foster children. 107 CONG. REC. 6387 (1961) (Remarks of Sen. Kerr and Sen. Javits). This would assure that children who had been living in unsuitable homes would now live in "suitable" ones.

To meet its goal of helping assure the most suitable care for the class of children judicially removed from their homes, Congress required the "development of a plan for each such [foster] child . . . to assure that he receives proper care." Section 408(f)(1). These and other services, directed towards providing a permanent placement for the child as well as the most suitable foster



home, were central to the focus of the Program, and directly responsive to the abuse and neglect to which eligible children had been subject in their own homes. *See* HANDBOOK § 3452(13). These included services to the foster child in the foster family home, to help with, *e.g.*, the "emotional . . . problems" attendant upon judicial removal from his own home and services to the original parent to make possible the return of the foster child to his own home. *Id.*

Congress had always considered a parental or relative home to provide the only suitable care for dependent children. Sections 406(a), (b). But there was a need to provide more placements than relatives could provide for neglected children removed from their own homes, S. REP. No. 165, 87th Cong., 1st Sess. 6-7 (1961), and to address the problem that some relatives were unable to accept responsibility for such children because of other financial obligations and low AFDC benefit rates. HANDBOOK § 3435.3 (1947). Without enough relatives to accept the children, state and local governments had been required to bear much of the financial burden of caring for foster children in non-relative homes and in institutions, to the limited and insufficient extent that they were able to do so. S. REP. No. 165, 87th Cong., 1st Sess. 6-7 (1961). In sum, the "lack of financial resources for such care had hindered the development of the most suitable care for children who have to be cared for outside of their own home." *Id.*

To help states place homeless children where they would receive the "most suitable" care appropriate to their needs, it was necessary for Congress to authorize categorical Foster Care aid to all AFDC children abused and neglected in, and judicially removed from, their homes. Congress therefore expanded the number of homes in which the state might place such children, by

authorizing categorical matching funding even if the state placed such children in the homes of non-relatives. S. REP. No. 165, 87th Cong., 1st Sess. 6 (1961). By making the homes of "all individuals," *see* pp. 35-38, *infra*, eligible for federal aid, regardless of the relationship of the foster parents to such children, Congress maximized the number of homes in which such children might be placed, and still be eligible for federal welfare benefits. This advanced the goal of providing the most suitable care for such children. Thus, the purpose of making children placed in non-relative homes eligible for Foster Care was to leave the state courts "free to consider the situation as to the welfare of the child." 107 CONG. REC. 6387 (1961) (Remarks of Sen. Kerr).

In 1962, Congress made the Foster Care Program permanent, and expanded eligibility to cover children placed in child care institutions. HEW Secretary Ribicoff recommended the institutional amendment, stating that the purpose of the amendment was to "allow the States a wider latitude in finding the most suitable place for an individual child." *Public Assistance Act of 1962: Hearings on H.R. 10606 Before the Committee on Finance*, 87th Cong., 2d Sess. 65 (1962) (Memorandum of Secretary Ribicoff to Senator Byrd).

The House passed the child care institution amendment, but the Senate Finance Committee rejected it. Senator McCarthy introduced the amendment on the Senate floor, stating that its purpose was to permit the most appropriate placements for neglected children, who often had special problems, because of the unsuitable homes in which they had been living.

> The conditions which make it necessary to remove such children from unsuitable homes often result in needs for special psychiatric and medical care of the children. . . .
>
> * * *



> A second factor which limits the courts under the present law is that of the difficulty—and apparently in many cases the impossibility—of finding foster family homes for children under these circumstances. These are the most underprivileged children and often have special problems. . . .
>
> * * *
>
> The issue is whether the Federal Government is going to place restrictions on programs which limit the courts from making a placement in the best interest of the child, forcing him to remain in a home which has been determined as an unsuitable place.

108 CONG. REC. 12692-93 (1962).

In establishing the Foster Care Program, Congress made it possible to make higher Foster Care payments to eligible children than would be paid under the basic program. Foster Care payments were to be determined "according to State standards as to the appropriate amount needed for *such care*," not necessarily the same as needed by children under the regular program. S. REP. NO. 165, 87th Cong., 1st Sess. 6 (1961) (emphasis added.) Indeed, all participating states, including Illinois, immediately began paying substantially higher benefits under the Foster Care program than under the basic program, even though Congress did not provide any higher federal matching share for Foster Care benefits.[13] These states, as well as Congress, thus recognized that the Foster Care program was intended to benefit a class of neglected children with greater needs than children eligible for the basic program;

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[13] In October, 1961, the first month for which HEW reported Foster Care payment levels under a separate table listing, the seven participating states paid an average of $76.28 monthly in benefits for each foster child. The same states paid an average of $35.45 for each child receiving regular AFDC benefits. 25 SOCIAL SECURITY BULLETIN, No. 2, Tables 10, 14 (Feb. 1962). This differential has prevailed. U.S. DEPT. OF HEW, PUBLIC ASSISTANCE STATISTICS: APRIL 1977 (Sept. 1977), *Compare* Tables 4 and 7.

providing "the appropriate amount needed for . . . care" of these children, *Id.*, involved correspondingly greater expenses.

In 1967 Congress greatly assisted the states in providing the most suitable care for this class of neglected children, and assuring benefits reflecting their special needs, by increasing the federal match for Foster Care benefits (under Section 403) to more than two and a half times that available for benefits under the basic program. Social Security Amendments of 1967, Pub. L. No. 90-248, § 205(b), 81 Stat. 892 (1968), 42 U.S.C. § 603(a)(1)(B) (1970).[14] The Senate Report stated that the increase was necessary "in order to obtain the best possible environment for the child." S. REP. No. 744, 90th Cong., 1st Sess. 163 (1967). The House and Senate Reports both stated that the increase was based on the recognition that "foster family care is more costly than care in the child's home," and was necessary to "facilitate plans being developed for children based on the need of the child." *Id.*, at 164-5. H. R. REP. No. 544, 90th Cong., 1st Sess. 101 (1967).

In short, Congress' overriding purpose in establishing, making permanent and providing increased federal funding for the Foster Care Program was to help assure that neglected and abused children removed from their own homes by state action would receive that suitable care most appropriate to their special needs. It was a program of "remedial action." S. REP. No. 165, 87th Cong., 1st Sess. 6 (1961). For the class of neglected AFDC children judicially removed from unsuitable

[14] In 1965 Congress had given the states an alternative to claiming federal AFDC funding under § 403 by permitting them to receive funding under § 1118. Social Security Amendments of 1965, Pub. L. No. 89-97, § 411, 79 Stat. 423 (amended 1968, 1976). Many states still used the § 403 funding formula in 1967; several still do.



homes and placed in the care of the appropriate state welfare agency, Congress required proper placement efforts, supervised by the state agency. It required the "foster family home" or "institution" in which eligible children were placed to meet state-defined standards governing its suitability as a foster child placement. It authorized categorical federal aid for these children, in all such homes and institutions, thus freeing the states from major financial restrictions inhibiting them from making the most suitable placements for the children. Finally, because of the special needs of all children removed from their homes by judicial action, the Program provided substantial additional cash money benefits and specialized services not provided under the basic program.

As the next section demonstrates, Illinois' placement policy parallels that of Congress. Thus, where the homes of relatives meet state qualitative standards, Illinois places foster children in such homes; it simply refuses to provide to these children the special benefits and services which Congress determined that they needed.

## V.

## ILLINOIS PLACES OTHERWISE ELIGIBLE FOSTER CHILDREN IN THE HOMES OF RELATIVES AND APPROVES THESE HOMES AS MEETING ITS OWN QUALITATIVE LICENSING STANDARDS FOR THEIR CARE; THESE CHILDREN THEREBY COME WITHIN THE FEDERAL DEFINITION OF AFDC-FOSTER CARE ELIGIBILITY, UNLESS CONGRESS MEANT TO EXCLUDE SUCH HOMES FROM THE STATUTORY UNDERSTANDING OF "FOSTER FAMILY HOMES."

In this case, the state officials implicitly concede, as they must, that Timothy and Mary Lou Robertson meet the Foster Care eligibility requirements specified in Sections 408(a)(1), (2), and (4): they were eligible for

AFDC, judicially removed from their own home because of a finding of neglect, and placed in the care of DCFS. Because DCFS later placed Timothy and Mary Lou in the home of a relative, however, appellants deem them ineligible for AFDC-Foster Care. Illinois contends that the homes of relatives in which it places foster children are not "foster family homes" within the meaning of Section 408(a)(3). The benefits Congress meant to provide to neglected children judicially removed from their own homes and placed in "foster family homes" are thereby denied to these children.

Section 408 sets forth a statutory definition of "foster family home":

> For purposes of this section the term "foster family home" means a foster family home for children which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing homes of this type, as meeting the standards established for such licensing. . . .

If the (relative) homes in which the state places the children here come within this statutory definition, then the children are eligible for AFDC-Foster Care, since these homes' alleged failure to meet the Congressional definition of a "foster family home" is the only reason why the state denies eligibility to the children.

Illinois deems placement of its state wards in the homes of relatives to be at least as suitable, if not a more suitable, placement, than one with non-relatives;[15] indeed, it has placed about 1900 state wards for which it has responsibility in relative homes. *See* n. 23, *infra.*[16]

[15] ILL. REV. STAT. ch. 23, § 705-7 (Supp. 1977) provides, in relevant part, that a juvenile court may place a state ward in "the custody of *a suitable relative* or other person" (emphasis added).

[16] DCFS, PLACEMENT MANUAL, Ch. 3, Pt. V (IV) (1972), (A. 37), provided that "relative resources should be explored for all children for whom placement is indicated." This provision has been redesignated as DCFS, CHILD WELFARE MANUAL 2.8.2 (1976).



Moreover, Illinois has at all relevant times required the homes of relatives in which foster children are placed to meet the state standards for licensing related to the quality of care received by the child in the home.[17] Accordingly, DCFS not only placed Timothy and Mary Lou in the home of a relative, but approved it, as it does all

[17] ILL. REV. STAT. ch. 23, § 4-1.2 (Supp. 1977), states that children in state custody are eligible for regular AFDC benefits if placed in a "foster family home . . . licensed pursuant to the Child Care Act . . . *or approved by the Department as meeting standards established for licensing under the Act*" (emphasis added).

ILL. REV. STAT. ch. 23, § 2217 (Supp. 1977), provides that:

> The Department must prescribe and publish minimum standards for licensing that apply to the various types of facilities for child care defined in this Act *and that are equally applicable to like institutions under the control of the Department* . . . (emphasis added).

ILL. REV. STAT. ch. 23, § 2212.05 (Supp. 1977), defines "facility for child care" to include "homes" as well as "institutions."

DCFS, PLACEMENT MANUAL, Ch. 3, Pt. V (IV) (1972), (A. 38), as amended and redesignated DCFS, CHILD WELFARE MANUAL 2.8.2 (1976), implemented ILL. REV. STAT. ch. 23, § 2217:

> When a relative home is being considered as a placement resource, the home must meet the minimum standards for foster family homes, although the home is not subject to licensing.

DCFS Regulation 5.12, at all relevant times, has specified the "Minimum Standards for Licensed Foster Family Homes." Subsequent to the district court's Final Judgment herein, DCFS Regulation 5.12 was amended to state, "Regardless of auspices, all foster family homes shall meet licensing requirements and standards." *See* First Amended Interim Report to the [District] Court, filed October 9, 1976); a "relative home" was redefined as a type of "foster home" which must be approved by the Department for care of a state ward. DCFS, CHILD WELFARE MANUAL 2.2.1, 2.2.2 (1977). DCFS, CHILD WELFARE MANUAL 2.8.2 now reads, in relevant part, "Children for whom the Department has legal responsibility . . . *shall be placed only* with relative caretakers *approved* by the Department" (emphasis in original). Thus, at all relevant times state law and policy have required relative foster homes to meet state licensing standards applicable to the homes in which state wards are placed.

relative foster homes in which it places state wards, as meeting Illinois' defined qualitative "standards for . . . licensing." Section 408. DCFS signifies its approval of such homes as suitable foster placements in a Home Placement Agreement materially identical to that used to license non-relative foster homes in which it places identically situated children.

The licensing or approval requirement was, as explained, included to assure that the homes in which the state placed eligible foster children would meet minimum state qualitative licensing standards for their care. Under Illinois' own policy, the state regularly places the otherwise eligible children here in the homes of relatives, and approves their homes as meeting such standards. Therefore, insofar as the statutory definition of "foster family home"—and the plaintiff children's eligibility for the Foster Care Program—turns on whether the home in which otherwise eligible children are placed have been "approved . . . as meeting the standards established for . . . licensing," the relative homes in which the children here are placed meet that definition. This means that Illinois has itself brought these homes within the statutory definition of "foster family homes," and the children here placed in such homes within the federal definition of eligibility, unless Congress meant simply to exclude the home of a relative of an otherwise eligible child from the statutory understanding of the term "foster family home."

Whether Illinois could adopt an explicit state policy that relative care was unsuitable for foster children, and so refuse to license or approve such homes as "foster family homes" and place children in them, thus is not a question presented in this case.[18] Illinois does deem relative homes suitable placements for foster children,

[18] The Solicitor General correctly questions whether, if Illinois did adopt such a policy, it would pass muster under the Act. (Brief for the United States as Amicus Curiae at 17).

(Footnote continued on following page)



approves such homes as meeting the standards established for licensing within the meaning of Section 408 and places foster children in them. Appellants do not argue otherwise.[19] The question in this case is thus whether Illinois can approve the homes of relatives as placements for otherwise eligible foster children, and then deny Foster Care eligibility, benefits and services to those children.

[18] *continued*

Though Congress certainly intended the states to define the qualitative standards governing suitable placements for foster children, it does seem questionable whether Illinois could apply their licensing standards in a way to completely undermine the express purpose of the Act to "encourage the care of dependent children in their own homes or in the homes of relatives," § 401, much less place foster children in the homes of relatives but not approve them, and then deny eligibility on this ground. Common sense rebuts the suggestion that Congress meant to permit a state to deny eligibility for any and all benefits under the AFDC-Foster Care Program to a child because of the state's failure to extend to him a safeguard Congress intended for his protection, placement in a licensed or approved home. HEW has issued a Memorandum to the states stating specifically that the states can not, by refusing to license or approve a home in which it had placed an otherwise eligible child, deny Foster Care eligibility to that child. HEW Memorandum APA-IM-71-7 (1971), at Appellees' Supp., S-4. The same rule is incorporated in 45 C.F.R. § 233.110 (1976), which provides that for children such as those here, meeting the eligibility requirements of §§ 408(a)(1), (2), and (4), the state must develop a plan so that [they] *will* be placed in a foster family home in accordance with . . . [their] need[s]." 45 C.F.R. § 233.110(a)(2)(i) (emphasis added). In other words, a state has no discretion not to place the children here in a "foster family home." Therefore, under HEW regulations, any homes in which the children here are to be (or have been) placed must be approved (or must, under the regulations, have been approved) as meeting state licensing standards.

[19] Appellants have abandoned any argument that they can deny AFDC-Foster Care eligibility to the children here because the (relative) foster homes in which the state places them cannot be or have not been licensed or approved as meeting the standards established for licensing within the meaning of § 408, last paragraph, and thus cannot be "foster family homes" within the meaning of § 408(a)(3). This argument was presented in the Court of Appeals and rejected, *Youakim*, 562 F.2d at 488; appellants do not advance it here.

## VI.

## ILLINOIS CANNOT DENY AFDC-FOSTER CARE ELIGIBILITY TO OTHERWISE ELIGIBLE FOSTER CHILDREN SOLELY BECAUSE IT PLACES THEM IN THE HOMES OF RELATIVES.

The state officials argue here that denying Section 408 benefits and services to otherwise eligible foster children Illinois places in relatives' homes is permissible under the Act, as well as required by the challenged statutes, because the term "foster family home" in Section 408(a)(3) must be understood to exclude the home of an otherwise eligible child's relative. This argument, which is premised on a Congressional intent to exclude children placed in relatives' homes from Foster Care eligibility, is incorrect.[20] As shown below, the language of Section 408, related provisions of the Act, and the legislative history of the Foster Care Program, demonstrate that Congress meant to require Foster Care coverage for an otherwise eligible child the state placed in *any* home meeting state qualitative standards, including the home of an otherwise eligible child's relative.

**A.** A threshold question is whether the ordinary use of the word "foster" is confined to non-relatives, since Congress is assumed to use words in their ordinary way. *Shea v. Vialpando*, 416 U.S. 251, 260 (1974); *Richards v. United States*, 369 U.S. 1, 9 (1962).[21] Both in common

[20] Inferentially, the state argues, the same exclusionary treatment of otherwise eligible children placed in relative homes would be required in all fifty states, including the at least 36 states which presently do cover such children under their Foster Care Programs. See Memorandum for the United States as Amicus Curiae submitted in *Youakim I*, at A. 5.

[21] In the Court of Appeals, the state officials contended that the ordinary meaning of the word "foster" denoted a non-relative home. *Youakim*, 562 F.2d at 486. In this Court, however, they maintain only that "the definition of 'foster family home' is unclear from the statute itself." State Brief at 22.



speech and in judicial decisions the adjective "foster," (*e.g.*, "foster child," "foster parent," "foster family home," etc.) is often used to denote care by non-parental relatives. In *Baumet v. United States*, 344 U.S. 82 (1952), an insured serviceman's natural father had abandoned him. Thereafter, until his death, the serviceman's aunt and uncle cared for him. This Court referred to the parents as "foster parents." 344 U.S. at 84-5.[22] And in *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977), this Court stated:

> A biological relationship is not present in the case of the *usual* foster family.

431 U.S. at 843 (emphasis added).[23]

This usage of the term is also employed by Illinois courts. *Dixon National Bank of Dixon v. Neal*, 5 Ill.2d 328, 333, 125 N.E.2d 463, 466 (1955) (aunt as "foster-mother"). While standard dictionary definitions diverge on whether "foster" includes non-parental relative,[24]

[22] *See also* Douglas, J., dissenting in part, 344 U.S. at 85, and *Baumet v. U.S.*, 191 F.2d 194, 196-7 (2d Cir. 1951). (Swann, Learned Hand, Augustus Hand)

[23] This is, statistically, true in Illinois as well. Over 18,000 state wards were in foster family homes in 1976, at the time of the district court decision. ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES, *1978-80*, PLAN FOR CHILDREN AND FAMILY SERVICES (1977). Fewer than 1900 of these wards were placed in the homes of relatives. Affidavit of Michael D. Timko (Chief, Division of Information Systems, DCFS) filed in proceedings below with U.S. Court of Appeals (7th Cir.) on September 9, 1976. This Court, in *Smith*, also stated:

> The term "foster care" is often used . . . to apply *to any type of care that substitutes others for the natural parent in the parental role. including* group homes, adoptive homes, and institutions, as well as *foster family homes.* [Citing A. KADUSHIN, CHILD WELFARE SERVICES, 355 (1967)] (emphasis added.)

[24] Compare IV THE OXFORD ENGLISH DICTIONARY 486-87 (1970) and RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, 559 (1967) (including relatives) with FUNK AND

(Footnote continued on following page)

legal decisions regularly include the expansive understanding of the term.[25]

As *Baumet* and *Smith* indicate, the "foster" concept turns not on the presence or absence of kinship, but rather depends on the qualitative relationship between the child and the new, substitute parents, as derived from the "law and contractual arrangements." *Smith v. Organization of Foster Families*, 431 U.S. at 845. In the present case, Section 408(a) defines that relationship primarily in terms of the circumstances and events in the foster child's life: judicial removal from his home, care and custody by a state agency, and placement in a foster home. And it defines "foster family home" in terms of state's law governing the suitability of that home to nurture that relationship. Illinois law, in turn, requires a relative foster home to meet state

[24] *continued*
WAGNALL'S STANDARD COMPREHENSIVE INT. DICTIONARY 498 (1973) (excluding relatives). See also WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 897 (1976), discussed in *Youakim*, 562 F.2d at 486. As in *Burns v. Alcala*, 420 U.S. 575 (1975), "reliance on dictionaries cannot solve the question presented in this case." 420 U.S. at 578 n.3.

[25] *E.g., Norfolk and W. Ry. Co. v. Estepp*, 204 F.2d 880, 881 (6th Cir. 1953) (Grandfather's wife as "foster mother"); *Thomas v. U.S.*, 189 F.2d 494, 497 (6th Cir. 1951) (Aunt as "foster parent"); *Pistone v. Romano*, 349 F.Supp. 293, 294 (E.D. Pa. 1972) (Aunt and uncle as "foster parents"); *Davis v. Celebrezze*, 239 F.Supp. 608, 612 (S.D. W.Va. 1965) (Grandparents as "foster parents"); *Miller v. Ribicoff*, 209 F.Supp. 460, 462 (E.D. Pa. 1962) (Aunt and uncle as "foster parents"); *In Re James M*, 65 Cal. App. 3d 254, 257, 135 Cal. Rptr. 222, 224 (1976) (Nephew as "foster child"); *Perrenoud v. Perrenoud*, 206 Kan. 559, 566, 480 P.2d 749, 752 (1971) (Aunt and uncle as "foster parents"); *Boling v. Barnes*, 216 So. 2d 804, 804 (1968) (Aunt as "foster parent"); *In Re Erny Trust*, 415 Pa. 8, 10, 202 A.2d 30 (Niece as "foster daughter"); *Commonwealth v. Shade*, 242 Pa. Super. 115, 118, 363 A.2d 1187, 1188 (1976) (Aunt and uncle as "foster parents"); *Popko v. Janik*, 341 Mass. 212, 215, 167 N.E.2d 853, 854 (1960) (Wife's relative as "foster son"); *Pickle v. Page*, 252 N.Y. 474, 475, 169 N.E. 650, 651 (1930) (Grandparents as "foster parents"). See also cases cited at n. 42, *infra*.



licensing standards governing its suitability; the state's approval of such homes as meeting these standards is incorporated in a contract, the Home Placement Agreement.

The existence of substantial case law bringing relative care within the denotation of "foster" is not by itself dispositive of the question here. But Congress' central concern with helping assure the most suitable placement for neglected children removed from their homes, in the context of a remedial program designed to meet the children's special needs, is convincing evidence that a restrictive definition of "foster family homes," when there is no restrictive meaning to that word given in the Act itself, would only subvert Congress' intent. In sum, "foster" commonly, if not invariably, denotes relative as well as non-relative care of children. To give the term "foster family home" the denotation of "relative home" (as well as "non-relative home") ascribes to it a meaning it commonly and easily bears and is consistent with the purposes of the program.[26]

**B.** "[T]he term 'aid to families with dependent children' [used in 402(a)(10)] is given a very specific meaning in Section 406(b)." *Quern v. Mandley*, 46 U.S.L.W. 4594, 4598 (June 6, 1978). The same term with relation to foster children judicially removed from the home and needing foster care is given specific meaning in Section 408(b):

> (b) the term "aid to families with dependent children" *shall* . . . include . . . foster care in behalf of a child described in paragraph (a) of this section

[26] Similarly, Illinois uses "foster" in the broader sense, see *Dixon National Bank at Dixon v. Neal*, 5 Ill.2d 328, 333, 125 N.E.2d 463, 466 (1966); and, except when it comes to providing the benefits and services at issue in this case, Illinois does not distinguish between relative and non-relative placements. *See* pp. 28-30, *supra*.

(1) in the foster family home *of any individual* . . . (emphasis added).

The emphasized language is plainly important here and demonstrates the absence of any Congressional intent to exclude *a priori* a class of individuals as potential foster parents (or any class of homes meeting state qualitative standards as potential "foster family homes"). In *Shea v. Vialpando*, 416 U.S. 251, 260 (1974), another AFDC case, this Court said:

> By its terms, Section 402(a)(7) requires the consideration of "any" reasonable work expenses in determining eligibility for AFDC assistance. In light of the evolution of the statute and the normal meaning of the term "any," we read this language as a congressional directive that no limitation, apart from that of reasonableness, may be placed upon the recognition of expenses attributable to the earning of income.

To support their position, the state officials must read "any individual" in Section 408(b) as "any individual (except one related to the foster child)." This does not square with the "normal meaning" of the word "any." *Id.*

The state officials never come to terms with the import of the phrase "of any individual" in Section 408(b). They argue:

> [T]he term "any individual" in § 406(b) [*sic*] manifests the intention of Congress that assistance is to be provided for foster care whether the care is administered in the home of an individual person or family, or in a child-care institution. No other interpretation is logically possible.

State Brief at 21.

This explanation of Congress' intent is remarkable because it does not, by its terms, exclude relatives from the meaning of the term "any individual." Appellants' phrasing of "the intention of Congress" reflects the insurmountable semantic problem of excluding a related



individual from the scope of the phrase "any individual." The attempt to imply that the phrase was intended to contrast with care in a child-care institution founders on the legislative history: coverage for children placed in the foster family home of "any individual" was required one year before institutions were included as placements for eligible children.

In the absence of some reason to depart from the normal meaning of the phrase, the term "any" must here, as in *Shea v. Vialpando*, 416 U.S. 251, 260 (1974), mean a "congressional directive that [there is] no limitation" on the categories of persons, necessarily including relatives, who may provide "foster family homes" within the meaning of the statute.[27]

This construction of the phrase "any individual" is also most consistent with the purpose of the Foster Care Program to meet the needs of the eligible foster child by helping assure that he would receive the most suitable care available outside of his own home. The entire AFDC program is grounded on Congress' stated preference for relative care of dependent children and aversion to institutional care. S. REP. No. 628, 74th Cong., 1st Sess. 16-17 (1935); H.R. REP. No. 615, 74th Cong., 1st Sess. 10 (1935). Section 401 states that the purpose of the AFDC program is "to encourage the care of dependent children in their own homes or in the homes of relatives." Faced with this explicit preference for relative care under the AFDC programs, combined with an articulated purpose to provide the most suitable placements for foster children, appellants cannot

[27] Such a directive does not, of course, suggest that a state *must* place a child in the home "of any individual" or "any relative" who wishes to become a foster parent. As discussed at pp. 22, 30-31, *supra*, the state should properly place children only in foster family homes meeting its standards. Relative foster homes in Illinois are required to meet such standards. *See* pp. 29-30, *supra*.

plausibly maintain that Congress excluded from the Foster Care Program children placed in precisely the type of homes Congress generally considered to provide the most suitable care for children. There is no basis for finding that Congress suddenly departed from the fundamental principles of the Act and *sub silentio* gave preference to non-relatives (and, later, institutions) over relatives.

C. Congress did not require in Section 408 that a state actually license every foster family home. Congress established an equivalent "approval" procedure, providing that, as an alternative to licensing, a foster home could be "approved . . . as meeting the standards for . . . licensing." The legislative history of Pub. L. No. 87-31 does not explicitly indicate why Congress wrote the alternative approval procedure into the law for children judicially removed from their homes because of delinquency or neglect. But in 1961 some state laws exempted relative homes from licensing.[28] No other class of homes in which foster children might be placed were similarly excluded from licensing. Given this fact, the "approval" procedure would appear most logically to be Congress' means of assuring that the "licensing" safeguard would be extended to foster children placed in the homes of relatives.

A primary purpose of the Foster Care Program was to assure that foster homes met such qualitative standards:

[28] COLO. REV. STAT. §§ 26-6-104(2) (1973); FLA. STAT. ANN. §§ 409, 175(2) (1943) (West); IDAHO CODE §§ 39-1209, 39-1213, 39-1214 (1932); ILL. REV. STAT. Ch. 23 §§ 2212.05, 2212.17, 2214 (Supp. 1977); IOWA CODE ANN. §§ 237.2, 237.3 (1969) (West); MD. ANN. CODE art. 88A §§ 20, 21 (1957); MO. ANN. STAT. §§ 210.211 (1976); MONT. REV. CODES ANN. §§ 10-520, 10-521 (1977); N.H. REV. STAT. ANN. § 170.3 (1977); PA. STAT. ANN. tit. II, §§ 801, 802 (1961) (Purdon); R.I. GEN. LAWS §§ 40-13-2, 40-18-3 (1956); TEX. STAT. ANN. art. 695(c) § 8(a) (1964); VT. STAT. ANN. tit. 33 §§ 501, 502 (1959); WASH. REV. CODE ANN. §§ 74.14.120, 74.14.130 (1961); WIS. STAT. ANN. § 48.62 (1957) (West).



placement of abused and neglected children in suitable homes was crucial to their welfare. Congress must surely have anticipated that, in many cases, the state would place its wards in the homes of relatives. *See* p. 28, *supra* and n.32, *infra*. Anticipating such placements, and with presumptive "full knowledge" of state licensing laws, *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 430 (1946), Congress had to provide that (relative) foster homes would be approved as meeting the standards for licensing even if not required to be "licensed" *per se* under state law. By providing for the "approval" of "foster family homes," Congress thereby indicated that it meant otherwise eligible children placed in the homes of relatives to be covered under Section 408. For there would be no reason for Congress to have required that such relative homes be approved as meeting state licensing standards unless the children placed in those homes were meant to be eligible for AFDC-Foster Care.

In short, consistent with the goals of achieving suitable placements and maximizing the number of possible placements, Congress provided for coverage of placement of a Section 408 child in the home of any individual—so long as it was licensed or approved under state qualitative standards. As discussed in the next sections, subsequent amendments to the Foster Care Program underscored both the general purposes of the Program and the propriety of placement in the homes of relatives as consistent with those purposes.

D. Congress made the Foster Care Program permanent in 1962. Congress also amended Section 408 in 1962 to provide Foster Care coverage for children placed in child care institutions. Public Welfare Amendments of 1962, Pub. L. No. 87-543, § 135(a) 76 Stat. 172. It did so to assure that children for whom this might be the most suitable available placement would be covered under the Foster Care Program. 108 CONG. REC. 12693 (1962) (Remarks of Sen. McCarthy); *See* pp. 24-5, *supra*. Such a

Congressional purpose to provide Foster Care benefits in the most suitable homes would surely have led Congress to extend the program to homes of relatives also, were not such homes already covered, unless Congress deemed them less suitable than institutions for the care of foster children. The state officials' restrictive interpretation of "foster family home" must rest on the latter hypothesis. But the genesis of the entire AFDC program lay in Congressional hostility to institutionalization of dependent children. S. REP. No. 628, 74th Cong., 1st Sess. 16-17 (1935); H.R. REP. No. 615, 74th Cong., 1st Sess. 10 (1935). Under the 1956 Amendments to the Social Security Act, the stated purpose of the program was to "encourag[e] the care of dependent children in their own homes or in the homes of relatives." Section 401. Respect for this expressed Congressional preference, and Congressional hostility to institutionalization, supports the conclusion that any Congressional expansion of the placements covered under the Foster Care Program in order to assure the most suitable homes for neglected children, would not have included institutional placements if relative placements (*i.e.*, placements in the home "of any individual") had not already been available under the program, under the 1961 legislation.

**E.** The Public Welfare Amendments of 1962, also added to Title V of the Act a new Section 528 (repealed 1967; current version at 42 U.S.C. § 625 (1970) ) defining "child welfare services." Pub.L. No. 87-543, § 102(d)(1), 76 Stat. 184.

> For the purposes of this part, the term "child-welfare services" means public social services which supplement or substitute for parental care and supervision for the purpose of . . . protecting and promoting the welfare of children *including the strengthening of their own homes where possible, or where needed, the provision of adequate care of children away from their homes in foster family homes* or day-care or other child-care facilities (emphasis added).



The reference to "foster family homes" in this provision is Congress' only use of that term in the Act other than in Section 408 itself. The identity of language between these two statutes, passed contemporaneously, indicates that they should be interpreted the same way. *Northcross v. Board of Education*, 412 U.S. 427, 428 (1973). While the state officials assert that "foster family home" in Section 408 includes all such homes except those of relatives, the exclusion of relative homes is based neither on their "adequacy" as placement resources (the state, after all, places children in such homes, and approves them as meeting licensing standards) nor on the need of children for care in such homes—all children placed in such homes have been neglected and abused in, and then judicially removed from, their own homes. The inclusion of relatives' homes within "foster family home" in Section 408, on the other hand, is consistent with Congress' apparent understanding of the term in Section 528 as providing "*needed . . . adequate*" care of children "away from" their "own homes." This supports the conclusion that relatives are included. *Northcross*. The distinction drawn by Section 528 is between "foster family homes" and the children's "own homes." There is no hint that the distinction between "relative homes" and "non-relative homes" defines "foster family homes."

**F.** As of 1967, only 24 states and about 9,000 children participated in the Foster Care Program.[29] Congress' intent under the program had been to assist the states in assuring the best possible care for neglected AFDC children; it had instituted a program of

[29] 5 WELFARE IN REVIEW No. 5, Table 9 (May, 1967).

"remedial action" towards this end. S. REP. No. 165, 87th Cong., 1st Sess. 6 (1961). But the great majority of children who might be helped by the program remained ineligible for it because of state non-participation.

In the Social Security Amendments of 1967, Pub. L. No. 90-248, 81 Stat. 892 (1968), Congress acted to fill this significant gap in coverage by making the Foster Care Program mandatory for all states participating in the regular AFDC program. Pub. L. No. 90-248, § 205(a), 81 Stat. 892 (1968) (codified at 42 U.S.C. § 602(a)(20) ). As discussed, Congress also increased the federal match for Foster Care benefits so that it greatly exceeded the federal share for benefits paid under the basic program. *See* Section 403(a)(1)(B). The articulated basis of this decision was a Congressional finding that foster care was more expensive than care in the child's "own home," that states could not finance this greater cost without additional federal help, and that there was a need to assist the states in providing Foster Care benefits "based on the need of the child." H. R. REP. No. 544, 90th Cong., 1st Sess. 100-101 (1967); S. REP. No. 744, 90th Cong., 1st Sess. 165 (1967). The Solicitor General correctly observes, Brief for the United States as Amicus Curiae at 12-13, that Congress' basis for raising federal matching rates for Foster Care in 1967 "reinforces the conclusion" that it meant otherwise eligible children placed in the homes of relatives to be covered under the Foster Care Program. Just as the unique "need of the child" neglected or abused in, and judicially removed from, his own home, is the same regardless of whether he is later placed in a relative or non-relative home, also identical in either kind of foster home is the increased cost of meeting that need for these "most underprivileged children . . . [who] often have special problems." 108 CONG. REC. 12693 (1962) (Remarks of



Sen. McCarthy). Moreover, the Placement Agreement utilized in Illinois imposes identical obligations upon relative homes caring for foster children, as are imposed upon non-relative foster homes; the expenses necessary to meet these obligations are, by definition, the same. By definition, both groups of children also need the special services mandated by Section 408.[30]

By contrast, the import of the state's position is that Congress intended to bifurcate the class of those "most underprivileged" children on the basis of a status, residence in a relative home, which had no relationship to the special need which Congress designed these additional benefits to meet. Abused and neglected children placed by the states in non-relative homes would receive the additional benefits Congress wished the states to provide; the same children, if placed in relative homes, would not.

From a different perspective, the 1967 federal funding increase for Foster Care strongly supports the conclusion that Congress meant a "foster family home" to include a "relative home." If the state's position were correct, the 1967 funding increase amendment would have represented a specific Congressional effort to encourage

[30] DCFS in fact recognizes that otherwise eligible children it places in relative homes have special needs for additional benefits, just as do children it places in non-relative homes, for it gives special grants up to $105 to some children placed with relatives. State Brief at 5. This special DCFS program is obviously not regular AFDC; it is unavailable to any children receiving benefits under § 406. Rather, it constitutes a partial, albeit legally inadequate, recognition that foster children placed with relatives, unlike children in the regular AFDC program, are identically situated to other foster children with respect to need. DCFS thus recognizes the unique needs of such children, and approves the relative homes in which it places them as suitable homes, but simply refuses to extend, as a matter of right, the eligibility, benefits, and services mandated for *all* such children by § 408.

care of foster children in non-relative homes and in institutions rather than in relative homes. The higher cash benefits Congress intended to provide under that amendment would have been available under appellants' reading of Section 408(a)(3), only to non-relative homes and institutions. Congress would then have created a greater financial incentive for non-relative homes and institutions to care for neglected and abused children than it would have for relative homes to care for the same children. The result could only be fewer placements in homes of relatives[31] and more with strangers or in institutions. Moreover, since only placement in non-relative homes would make the child eligible for the federally-funded higher cash benefits and more intensive services available under the Foster Care Program, participating states would have an incentive to place children in non-relative homes, in order to provide them such benefits and services.

The Foster Care Program was meant to develop the most suitable care for neglected dependent children removed from their homes. The AFDC program had been established on the premise that the most suitable care for a dependent child was with family members, and that institutionalization of children was to be discouraged.[32] Section 401, applicable to the Foster Care

[31] The available research supports the common sense presumption that there is a direct relationship between foster care payment levels and the supply of foster homes. See *e.g.*, SIMON, *"The Effect of Foster-Care Payment Levels on the Number of Foster Children Given Homes,"* 1975 SOCIAL SERVICE REVIEW 405, finding that a given percentage increase in foster care payment levels would result in a percentage increase in the supply of foster homes between half and fully as large.

[32] More recent social welfare legislation embodies continuing Congressional aversion to institutionalization of children. See *e.g.*, Social Services Amendments of 1974, Pub. L. No. 93-

(Footnote continued on following page)



Program, specifically incorporated that Congressional preference. The state's position therefore attributes to Congress an intent to abandon, *sub silentio*, both 25 years of consistent policy under the AFDC program, and common sense, by encouraging the greatly increased financial expense and deleterious effects of institutionalizing children.

The state officials never address, except elliptically, the irony of a construction of Section 408 which at-

[32] *continued*
647 § 2, 88 Stat. 2337 (1975), 42 U.S.C. § 1397 (1970) (stating the goals of the Title XX Social Service Program as including the "preven[tion] of inappropriate institutional care"); Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, § 102, 88 Stat. 1110, 42 U.S.C. § 5602 (stating one of the goals of juvenile delinquency and prevention programs to "provide critically needed alternatives to institutionalization").

Congressional hostility to institutionalization corresponds to a wealth of empirical data establishing that the emotional and psychological needs of children are better met in family (including foster family) care than in institutional settings, and that children in institutional settings are particularly likely to be exposed to neglect and abuse. Two relevant studies are: S. PROVENCE and R. LIPTON, INFANTS IN INSTITUTIONS (1962), M.D. AINSWORTH, et al., DEPRIVATION OF MATERNAL CARE: A REASSESSMENT OF ITS EFFECTS (1962).

Such evidence explains the virtual unanimity of opinion among child care specialists favoring family care over institutional care. D. GILL, *Institutions for Children*, in CHILDREN AND DECENT PEOPLE (1974), pp. 53-87 and H. JAMES, CHILDREN IN TROUBLE: A NATIONAL SCANDAL (1970) are two studies reviewing the voluminous literature. See also A. KADUSHIN, CHILD WELFARE SERVICES (2d ed., 1974).

The dominant cultural values which lead to a societal preference for family over institutional care for children, are also manifested in legal solicitude for care of children by relatives. *See Moore v. City of East Cleveland*, 431 U.S. 494 (1977). *Compare Smith v. Organization of Foster Families*, 421 U.S. 816 (1977). In the social welfare context, this Court has been reluctant to attribute to Congress a purpose contrary to perceived dominant social values, absent a clear indication that Congress intended such a result. *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405, 413 (1973); *Carleson v. Remillard*, 406 U.S. 598, 604 (1972); *Woodward v. United States*, 341 U.S. 112, 113 (1951). See also *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892).

tributes to Congress an intent contrary to the basic goal of family care for dependent children. Quoting S. REP. No. 165, 87th Cong., 1st Sess. 7 (1961), they state correctly that the purpose of the program was to "assist the states in the protection and care of children." *Id.*, at 7; State Brief at 29. They suggest therefore that any Congressional intent to strengthen family ties was secondary. *Id.* The point the state officials miss entirely is that, under the AFDC program, it is precisely parental or relative care that Congress judged to be the best means of protecting and caring for dependent children. *See* pp. 15-17, *supra*. It did not abandon that judgment when it established the AFDC-Foster Care Program.

"[I]n the absence of an unmistakable directive," this Court will not construe a federal statute "in a manner which runs counter to the broad goals which Congress intended it to effectuate." *FTC v. Meyer*, 390 U.S. 341, 349 (1968). In reading "foster family home" to exclude relative homes, the state attributes to Congress, in one subsection of Section 408(a), an intent to legislate significantly different treatment to two classes of children identically situated as to need, in a program structured to assist the states to meet that common need for special care and protection. The state also attributes to Congress an intent to discourage relative care of dependent children in a program established to assist the states in providing the most suitable care to children, neglected in and removed from their homes; but Congress had always judged relative care of dependent children to be the care most suitable for them outside the parental home. In this case, the state's policy kept Sherry Robertson in an orphanage, the environment Congress considered least suitable for dependent children. The state officials' reading of "foster family home" more than "runs counter" to the "broad goals" of the Foster Care Program. *Id.* It wholly frustrates them.



G. Under Section 408, Congress vested the responsibility for placement of an eligible child with a state welfare agency, Section 408(a)(2), and provided that state qualitative standards were to determine the suitability of a home to provide foster placement. Section 408 thus does not define foster family home any more specifically than to require that (1) it must meet state licensing standards; and (2) that it can be the home "of any individual." No specific classes of homes (*e.g.*, relative, non-relative) are excluded from Congress' understanding of "foster family home," except unsuitable ones. There was simply no need to anticipate all possible criteria a state might use to define a suitable foster home.

In considering other amendments to the Social Security Act in 1967, simultaneously with the Foster Care Amendments discussed above, however, Congress encountered a context where specific recognition of the home of a relative as a foster family home was necessary. The 1967 amendments created a new Work Incentive Program ("WIN"), Pub. L. No. 90-248, § 204(b), 81 Stat. 890 (1968). Under WIN, Section 402(a)(19), 42 U.S.C. § 602(a)(19), an AFDC caretaker relative (in the basic program) who refused to cooperate with various job placement efforts would be denied benefits on his or her own behalf. Section 402(a)(19)(F)(i). But Congress recognized that it was inappropriate to deny AFDC benefits to any AFDC recipient child living with the relative:

> [I]f the relative makes such refusal, such relative's needs shall not be taken into account [in determining benefits] . . . and aid for any dependent child in the family in the form of payments of the type described in section 406(b)(2) . . . or *section 408* will be made.

Section 402(a)(19)(F)(i) (emphasis added). The reference to "payments . . . described in section 406(b)(2)" is to

AFDC protective payments to an individual other than the caretaker relative on behalf of children living with that relative, when the relative has been determined incapable of managing the AFDC benefits. The reference to payments under Section 408 is to Foster Care benefits.

This provision can only have been directed at one or both of two possible situations, either of which embodies an explicit Congressional recognition of a relative home as a "foster family home." The first situation is that of a non-cooperating parent of children receiving aid under the regular AFDC program, (*i.e.*, for her own son or daughter) who might also be a foster parent of a related child (*e.g.*, a niece) placed in the home under Section 408 (*i.e.*, his or her home would be a "foster family home"). In this situation, Section 402(a)(19)(F)(i) foreclosed two possible actions states might take with regard to the Section 408 foster children placed in the related foster home. The WIN requirements only apply to some dependent children and to relatives themselves receiving aid based on their relationship to the child. Section 402(a)(19)(A).[33] A state might attempt to assert that, because the higher Foster Care benefits Congress encouraged the states to pay under the 1967 amendments were aimed at assuring the quality of a broad range of conditions in the home, rather than (as in regular AFDC) meeting the subsistence needs of the child, a Section 408 payment was a benefit to the relative, subject to reduction or termination for non-participation in WIN. Congress therefore precluded any such attempt to affect the Section 408 benefits. In addition, Congress assured that where the adult recipient had in her care

[33] Thus the link to § 408 in § 402(a)(19)(F)(i) cannot concern a situation in which a child is living in a non-relative home, since WIN would not apply to the § 408 foster parent in this instance.



both her own children and a related foster child, no children's benefits, under either Section 406 (for her own children) or 408 (for the related foster child) would be terminated. This was necessary to protect all children in the not-uncommon situation of an AFDC parent also caring for an AFDC-Foster Care child. Both the House and Senate Reports describe the provisions requiring a continuation of aid to the dependent child living in the non-cooperating relative's home as requiring that "aid will be denied for any dependent child in the family *other than* payments described in section 406(b)(2) . . . *or aid under Section 408*" (emphasis added). H. R. REP. No. 544, 90th Cong., 1st Sess. 178 (1967); S. REP. No. 744, 90th Cong., 1st Sess. 285 (1967).[34]

The second situation is that an AFDC caretaker relative's refusal to cooperate might be viewed as symptomatic of generally unsuitable home conditions, and that the state welfare agency would then seek to remove the child from the home. In this situation, Section 402(a)(19)(F)(i) is a Congressional mandate that the child removed from the home be provided AFDC-Foster Care benefits under Section 408. The latter would, of course, require that the child of a parent who refused work could only be removed from the home after an independent judicial determination of the home's unsuitability. In an area where some state

[34] HEW and the Department of Labor have both promulgated regulations governing the WIN program which also seem to anticipate that the provision for Foster Care benefits under § 402(a)(19)(F) is applicable to children who are in and remain in the home of the non-cooperating relative.

> If such individual found to have failed or refused to cooperate with WIN, without good cause, is a caretaker relative receiving AFDC, his needs will not be taken into account in determining the family's needs for assistance, and *assistance in the form* of protective or vendor payments or *of foster care will be provided to the remaining members of the assistance unit.*

45 C.F.R. § 224.51(a)(1) (1976); 29 C.F.R. § 56.51(a)(1) (1977).

officials might be tempted to use the removal of children as a device to punish a mother who refused to work, perhaps without adequate consideration for the best interest of the child, the requirement of a judicial determination would provide an important protection to those best interests. Congressional wariness of coerced removals of children from their own homes had prompted the judicial removal provision in the first instance. See p. 21, *supra*. Congress thus limited the agency's remedial action either to continuing payments to the child *in the home* (by protective payments and/or foster care payments) or to providing Section 408 Foster Care benefits *outside the home*, in a "foster family home."[35] But if Section 408 Foster Care benefits were required to be provided to *any* child placed outside his home, then this must mean that a "foster family home" is *any* home, including a relative home, in which a child judicially removed was placed.

Thus, from both perspectives, Section 402(a)(19)(F)(i) represents a specific Congressional recognition of the relative home as a "foster family home."

H. Reviewing Section 408 and related provisions of the Act thus demonstrates that Congress understood the term "foster family home" as the family home "of any individual" maintaining a suitable home for a foster child, under applicable state standards. Congress did not intend to interfere in a state's determination as to what the most suitable placements for foster children might be; its primary concern was to assist the state in providing the most suitable care available for a neglected and abused child judicially removed from his home because

[35] The § 406(b)(2) protective payments for the child alone obviously were not the intended relief for a child removed and placed with a new relative, since in such a home there would be no reason to restrict payments to only the child or to make them "protective."



of unsuitable conditions there. See pp. 20-7, *supra*. There was therefore no restriction on placement eligibility, except as might be defined by state qualitative licensing standards. "Any individual" included all individuals who were suitable foster parents, and whose homes were therefore suitable "foster family homes." Congress intended *all* groups of individuals to be included as potential foster parents under Section 408; no group was to be excluded so long as the homes met the state's own standards for suitable care for foster children. Illinois judges relatives to provide such suitable care, places hundreds of state wards in relative homes, and requires these homes to meet the state's own standards. Therefore in Illinois, the homes of relatives of otherwise eligible children are "foster family homes" within the meaning of Section 408; and these children are eligible for federal Foster Care benefits.

The state officials' contention that Congress intended to exclude relative homes from the definition of "foster family home" is based on the variously phrased argument that the Foster Care Program duplicates coverage under the basic AFDC program, State Brief at 15, 20, 26, 34-36, and that Congress intended to extend Foster Care eligibility only to persons who were not previously (and are not now) covered under the basic AFDC program. State Brief at 19, 21, 26, 31-32. The Court of Appeals characterized this argument as "an elaborate, indeed ingenious argument, regarding an implied legislative intent," *Youakim*, 562 F.2d at 487, and rejected it.

Coverage of children living with relatives under the Foster Care Program does not duplicate coverage available under the basic AFDC program. Eligibility for Foster Care is defined by additional eligibility criteria involving a court-ordered judicial removal from

a child's home because of neglect or abuse, and state custody. Sections 408(a)(1), (2). The Foster Care Program provides a distinct set of benefits and services tailored to meet the special needs of neglected, exploited, or abused wards of the state, which benefits and services are in significant respects different from and superior to those offered under the basic AFDC program. In all participating states, it provides higher cash benefits, and intensive services, including services to the original parent aimed at reuniting the foster child with his parent, not available under the basic program. These provisions are responsive to the special needs of foster children, and the higher costs of caring for them. This has been so since the establishment of the Program. *See* p. 25, *supra.*

Further, while Congress, in establishing the Foster Care Program, certainly intended to provide Foster Care benefits to children who had not previously been covered under the AFDC program, its doing so was only one means by which to achieve its primary purpose under the Program. This purpose was to help assure all abused and neglected AFDC children of the most suitable care outside their own homes, if removal from their homes was necessary.

The state officials cite *Burns v. Alcala*, 420 U.S. 575 (1975), in support of their position. State Brief at 15. In *Burns*, the question was whether "unborn children" were "dependent children" within the meaning of Section 406(a), thus making pregnant women eligible for AFDC benefits. The major reason for making AFDC payments to expectant mothers on behalf of their unborn children would be to enable the mother to obtain adequate prenatal care. *Burns*, 420 U.S. at 583 n.10. This Court considered the specific coverage of prenatal and postnatal health services under Title V of the Act,



created simultaneously with the enactment of the AFDC program in 1935, to be one element of "evidence" of a congressional intent not to include unborn children under AFDC. *Id.* One consideration in *Burns* was that Congress would not have established a separate program to meet the special needs of unborn children and their mothers, if it were simultaneously enacting another program which would meet those needs. This logic is inapplicable here. It does not support an inference that Congress, having enacted the AFDC Program in 1935, must be presumed to have made eligible in a new comprehensive Foster Care Program enacted 26 years later, only those neglected and abused children who had received no cash benefits under a different program enacted 26 years earlier. Such an inference would rest upon a hypothesis—unsupported by the statute or the legislative history—that Congress was without the initiative and resolution to enact a new program which would meet the common and unique needs of all impoverished, abused and neglected children, judicially removed from their homes. But Congress obviously can identify, and has here identified a particular problem, common both to a small number of persons previously eligible for lesser benefits under an existing program and a larger number of persons who are not, and can formulate a new program for which both groups are eligible on the basis of shared characteristics set forth in detail in the statute.[36]

[36] It has done so in other contexts. It enacted, in the same bill as the Foster Care Program, the AFDC-Unemployed Parent ("AFDC-U") program. Act of May 8, 1961, Pub. L. 87-31 § 1, 75 Stat. 75. Under that program, § 407, 42 U.S.C. § 607 families who had been and remained covered by the federal-state program of Unemployment Compensation [Section 301 *et seq.*, 42 U.S.C. §§ 501 *et seq.* (1970)], see Section 407(d)(3) and *Philbrook v. Glodgett*, 421 U.S. 707 (1975), *and/or* the basic AFDC program, (*i.e.* a child who had been residing with a

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The state officials also contend that the Section 408(f)(1) provision relating to placement in the home from which a child was removed or of a "relative" "conclusively establish[es] that [AFDC] foster care is simply not considered to be related care." State Brief at 20. They argue that Congress could not have intended to make relatives eligible for AFDC-Foster Care if that section required them to provide services making possible placement in the "home of a relative."

This simply reads too much into Section 408(f)(1). As the State officials recognize, State Brief at 20-21, Section 408(f)(1) sets forth the goals of long range planning for the "placement needs" of the foster child. *See also* HANDBOOK § 3453(9) (1963) (describing the Section 408(f)(1) services as involving the development of "permanent and suitable plans" for the foster child). Section 401 provides that the purpose of the AFDC program is to "encourage the care of dependent children in their own homes or in the homes of relatives." Accordingly, the first long range goal is to return the foster child to the home from which he has been removed, usually that of his parent(s). Section 408(f)(1) thus requires that "services [be] provided which are designed to improve the

[36] *continued*
single unemployed parent), were eligible for aid. In this context, the logic of the state's position is that if a state established higher benefits for the AFDC-U program than for the basic program, *e.g.*, to cover the expenses of looking for employment, it could deny a family consisting of a single unemployed parent and a child such benefits, on the theory that they were also eligible for the (lower) benefits of the basic program. Similarly, in Title XVI of the Act—Congress enacted the Supplemental Security Income program for the needy, aged, blind and disabled. Act of October 30, 1972, Pub. L. No. 92-603, § 301, 86 Stat. 1465. In addition to newly eligible groups, this program, §§ 1181 *et seq.*, 42 U.S.C. §§ 1381 *et seq.*, includes disabled children under the age of 18 who previously had been eligible because of their age and need for AFDC benefits. Congress redefined their eligibility and improved their benefits by superseding the prior criterion for their eligibility (age) and recognizing a more refined basis for eligibility (disability), predicated on a greater need.



conditions in the home from which he was removed." But a foster child's permanent return to the home from which he was removed may not be possible: conditions in that home may not "improve." In this circumstance, proper long-range planning for the child's permanent needs would require that efforts be directed towards another type of permanent placement. Under Section 401, the preferred permanent placement in these circumstances must be in the "home . . . of relatives." Accordingly, Section 408(f)(1) provides for services to "make possible" placement in the "home of a relative" on a permanent basis, with the cessation of state wardship after a finding that Section 408 benefits and services are no longer necessary.

The reference in Section 408(f)(1) to placement "in the home of a relative" is therefore consistent with reading "foster family home" to include relative homes. In this context, Section 408(f)(1) simply assumes what is otherwise clear: that Section 408 placement in any particular foster home, whether that of a relative or non-relative, is not "permanent" so long as the state is providing temporary foster care and exercising legal control over the child. For a placement to be, or become, permanent, the relative in whose home a neglected child is placed must be willing to accept the child on a permanent basis, and the state must conclude that a permanent placement in that home is appropriate for the child and thus relinquish its wardship. Unless both these conditions are met, the state agency should provide services making possible a permanent placement in the home from which he was removed or in the home of another relative.[37]

[37] The state officials erroneously characterize this as "mandat[ing] the removal of a child from AFDC-Foster Care [in a relative's home] for placement in another relative's home as

(Footnote continued on following page)

Moreover, the subsections of Section 408 regarding federal funding of these special services also support the foster children's position. As the Court of Appeals noted, *Youakim*, 562 F.2d at 489-90, subsections 408(d) and (f) are linked. Subsection (d) provides that the "services described in (f)(2) shall be considered as part of the administration of the State plan for purposes of Section 403(a)(3)." The services described in (f)(2) are the services of the Title V public welfare agency "in placing such a child in a foster family home." The purpose of subsection (d) was to make such services eligible for the 50% federal matching share then available under Section 403(a)(3). Without such a provision, the services described in (f)(2) would not have qualified for any AFDC funds because they would not have been services of the "state agency" administering the Title IV AFDC program, as otherwise required by Section 403(a)(3). It was particularly appropriate to provide federal matching funds for the Title V agency providing such services, since Congress considered placement services to be "necessary . . . for the proper . . . administration of the State Plan [for AFDC, including AFDC-Foster Care]." In 1961 and today, such services are defined both in § 403(a)(3) and by reference to Section 402(a)(14) to include "services" provided to "maintain and strengthen family life." But under the state officials' reading of Section 408, "proper . . . administration" of the Foster Care Program would preclude the placement of a foster child in the manner best calculated to "maintain and

[37] *continued*
soon as possible." State Brief at 23. But § 408(f)(1) does not require removal from a relative's home any more than it does from a non-relative's home. It requires only that services be provided to "make possible" return to the home from which the eligible child was removed, or (permanent) placement in a relative's home. If such an alternative placement is inappropriate "to the individual child's needs," HANDBOOK, § 3452(12) (1963), it would not be required.



strengthen family life". Thus, as noted in the Solicitor General's Amicus Brief at 15-16, Section 408(f)(1) is not only consistent with coverage of the homes of relatives, but appears to support the preference for foster care by relatives. The Court of Appeals was therefore correct in concluding that the state's reading of Section 408(f)(1) was "tortured" and that "there is nothing" in that provision to suggest that foster children the state places in relative homes are ineligible for the Foster Care Program. *Youakim*, 562 F.2d at 490.[38]

The state officials also argue, State Brief at 27-28, that the Section 408(f) services are intended for children living with non-relatives because Congress had before 1961 deemed such children living with non-relatives to be "completely distinct", State Brief at 27, from the class of needy children living with relatives, insofar as it met the needs of the former separately under Title V of the Act. The import of this suggestion is apparently that, having already deemed the two groups to be "completely distinct," Congress kept the two groups distinct when it enacted the Foster Care Program. Title V child welfare services were *not*, however, restricted to children living with non-relatives. Section 521 (repealed, 1967; current version at 42 U.S.C. § 620 (1970)) provided, in relevant part for:

[38] Similarly, as the Court of Appeals additionally noted, 562 F.2d at 490, § 408(c) specifies a condition which must be met before AFDC-Foster children are to be counted under § 403(a)(1)(A) for federal funding purposes; it requires individuals counted as AFDC-Foster Care recipients for a particular month not to be "otherwise" counted (for federal funding purposes) as regular AFDC recipients for that month. The possibility that AFDC-Foster children would be "double-counted" is present because under § 408(a)(4), all AFDC-Foster children are removed from (regular) AFDC homes during the course of any month. The significance of § 408(c) in this context is that it restates the § 408(a)(1) and (4) eligibility requirements, which the plaintiff class meets.

> [W]elfare services (hereinafter . . . referred to as "child public welfare services") for the protection and care of homeless, dependent, and neglected children, and children in danger of becoming delinquent . . . .

"Dependency," of course, is the definition for the regular AFDC program of a child living with a parent or relative. Whether children were within the class of persons receiving Title V child welfare services, thus did not turn on whether they were living with non-relatives,[39] or, for that matter, on financial need. If the pre-1961 provision of services under Title V to neglected children has any relevance to the question here, it shows a consistent Congressional intent to consider all neglected children, living with relatives or non-relatives, as one class with respect to the particular type of deprivation (neglect in the home) prompting eligibility and particular services.

Appellants also suggest that the higher benefits and services available under Foster Care create a "financial incentive" for relatives to refrain from caring for needy children living in unsuitable homes, until they are judicially removed from their homes. They assert that "this procedure, given its possible traumatizing effects, can never be in the best interests of the child," State Brief at 26, and argue that Congress could therefore not have intended any such results.

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[39] Nor, contrary to what might be inferred from the state's presentation, State Brief at 27-28, was the Foster Care Program a replacement program for the Child Welfare Service Provisions of Title V. Sections 521-8 of the Act survived the enactment of § 408. The Title V Child Welfare Service provisions were repealed in the Social Security Amendments of 1967, Pub. L. No. 90-248, § 240(e)(1), 81 Stat. 915 (1968). But those amendments simultaneously provided for the Child Welfare Services under a new Title IV-B of the Act, Pub. L. No. 90-248, § 240(c), 81 Stat. 911 (1968).



No such financial incentive exists under the statute. In 1967, Congress amended Section 408 to permit Foster Care eligibility even if a child were not living in the home from which he was judicially removed at the time the relevant judicial proceedings were initiated. Thus a relative who believed that the state might initiate proceedings to take legal custody of a child from an unsuitable parent would not jeopardize the child's benefits under Section 408 by taking the child in (and receiving regular AFDC benefits for the child) prior to the initiation of those proceedings. (Even if a child, abused or neglected in his own home, were currently living with a relative, the state would retain its interest in initiating proceedings to assure that the original unsuitable parent could not reassert his or her [at that point legal] custody of the child.) And if the relative believed that such proceedings were unlikely, possible Foster Care eligibility would not be a factor in the decision to accept a child.

The state's implication that coverage of children in homes of relatives under the Foster Care Program invites collusion between parents and relatives to secure higher benefits and to neglect family obligations which prevented them from accepting a neglected or abused child under the regular AFDC program, is a classic "floodgates" argument made in a context where Congress has effectively precluded such collusion by the provisions for judicial removal and welfare agency responsibility for placement of the child in a suitable home. Judicial and agency control foreclose any significant possibility of abuse.

The state officials also rely on several excerpts from the Senate Hearings and Senate Report on the 1962 Foster Care amendments. *Public Assistance Act of 1962: Hearings on H.R. 10606 Before the Committee on Finance*, 87th Cong., 2d Sess. (1962); S. REP. No. 1589, 87th Cong., 2d Sess., (1962). All the references, State

Brief at 29-30, correctly state or suggest that prior to the establishment of the AFDC-Foster Care Program, the AFDC program provided benefits only to children living with relatives, and that the AFDC-Foster Care Program modified this policy. None of the comments support an inference, much less establish, that Congress meant to exclude children placed in relative homes from Foster Care eligibility.

Appellants rely on two references in the Senate Finance Committee Report on the 1967 amendments to Section 408. S. REP. No. 744, 90th Cong., 1st Sess. (1967). One of those amendments broadened eligibility for the Foster Care Program, by eliminating the restriction that, to be entitled for the program, a child must have been *receiving* AFDC in the month in which the judicial proceeding leading to his removal were initiated. Under Section 408(a)(4), as amended, a child must be *eligible* for AFDC in the month in which court proceedings are initiated, *or within six months prior thereto.* Social Security Amendments of 1967, Pub. L. No. 90-248, § 205(c), 81 Stat. 893 (1968). The state officials set out State Brief at 31, a portion of the Senate Report discussing this amendment, and characterize it as supporting their position. As the more complete text of the Senate Report[40] and the nature of the amendment make clear, however, the state misreads the relevant language.

[40] Appellants delete the sentence immediately preceding that part of the Report which they quote: "For the State to receive any Federal sharing, the children must be recipients of AFDC when the court issues its order. Your committee believes that this is an unduly limiting restriction and is proposing that this limitation be changed." They also delete two sentences following the section they quote: "Also included are children placed under court order who had been living with one of the specified relatives enumerated in the law within 6 months and would have been eligible upon application for AFDC if he were living with such relative and

(Footnote continued on following page)



The state attempts to imply that the report language, "[f]ederal funds are not available . . . unless the child is in the home of a specified relative," refers to the home in which the child will be placed, and that "federal funds" means "regular Section 406 funds." But the full text demonstrates that the limitation on federal funding requiring the child to be in the home of the relative, and which Congress addressed, was the restriction that the child must have been receiving AFDC *in the home from which he was being removed*, and the timing restriction involved in removing him *from that same home*:

> [F]or the State to receive any Federal sharing, the children *must be recipients* of [regular] AFDC *when the court issues its order* . . . . [T]*his* is an unduly limiting restriction . . . . [C]ourts may be reluctant to place a child in foster care because Federal funds are not available . . . *unless the child is in the home of a specified relative* [when judicial proceedings are initiated and a court order is issued]. *The proposed change would make the cost of caring for children in foster care subject to federal sharing . . . if the child would have been eligible for aid under the AFDC program* if an application had been made on his behalf. *Also included are children placed under court order who had been living with one of the specified relatives enumerated in the law within six months* and would have been eligible upon application for AFDC . . . [To be eligible for AFDC-Foster Care under the "proposed change" a] child *need not live with a relative* and may be in a foster family home or in a voluntary institution *at the time the court makes its decision* (emphasis added).

[40] *continued*
were removed from the home of such relative by order of the court. . . . The child need not live with a relative and may be in a foster family home or in a voluntary institution at the time the court makes its decision."
S. REP. No. 744, 90th Cong. 1st Sess. 164 (1967).

Thus Appellants' assertion that "the courts' reluctan[ce]" [referred to in the Senate Committee Report] stemmed from the fact that foster care placement meant placement in unrelated homes, with the consequent loss of federal assistance," State Brief at 31, whereas "if foster care placement was viewed as placement with a relative, the courts would not have hesitated to place a child in foster care since federal funds would have been available," *Id.*, is simply wrong. The requirement at issue was that the child *be receiving* regular AFDC (and necessarily living with relatives) *in the month* in which the judicial proceeding leading to his *removal* was initiated, a requirement which had inhibited courts from *placing* children in foster care (related or unrelated) because, unless the dependent child met this limiting requirement, he was ineligible for the federally-funded AFDC Foster Care Program, *regardless of placement.* This is why the courts were "reluctant."

This is clear as well from the year the amendment was considered. The suggestion that the courts' "reluctance" stemmed from the non-availability of federal funds in non-relative homes founders on Congress having authorized funds in such homes in the original Foster Care legislation. In participating states it had been untrue for six years that federal funds were unavailable in the home of a non-relative. The State's error, therefore, is in trying to change the meaning of the referenced paragraphs by arguing the language of 1967 in the context of 1961. The Report concerns not placement, as the state implies, but conditions of removal.

The state officials also misinterpret that part of S. REP. No. 744, 90th Cong., 1st Sess. (1967), which is set out at its brief at 23. In 1967, the Foster Care Program was not mandatory for the states; nor did the federal government provide any higher federal matching share



for Foster Care benefits than for regular AFDC benefits. The majority of states did not participate in the Foster Care Program at all, *see* p. 41, *supra*, and those that did would presumably raise Foster Care benefits if the federal share were raised. It is in this context that the Committee's comments[41] must be considered.

The Committee noted that the "AFDC program already offer[ed] an opportunity for states to receive Federal financial assistance in the cost of care for many children . . . unable to live with their parents," *i.e.*, foster children. This was so: non-participating states received federal assistance under the basic AFDC program to care for foster children, *if* a relative could be persuaded to accept responsibility for care of the neglected child in his home, given its great cost, S. REP. No. 744, 90th Cong., 1st Sess. 164 (1967), and his other financial obligations, HANDBOOK § 3435.3 (1947). That is, "[f]ederal sharing is available to reimburse the relative

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[41] Appellants omit two sentences from the first referenced paragraph which they quote: "Thus, if children are deprived of parental support or care for the reasons now available to States under title IV, Federal sharing is available to meet the cost. It is not necessary for the relatives who, under State law, are not legally responsible for support, to meet the test of need applicable under the State AFDC plan, if they are caring for children who are eligible under the plan." These omitted sentences appear in the Report at the first ellipsis in the text as quoted by appellants.

Appellants delete one sentence from the second paragraph which they quote: "Effective July 1, 1969, State plans would have to provide for foster care under these terms. Federal sharing will be possible in payments up to $100 a month (on an average basis) for children in foster care. The committee believes that these liberalizations will be of material assistance to States and localities and will facilitate plans being developed for children based on the need of the child rather than the fiscal condition of the local government." This omitted sentence appears at the second ellipsis in the text as quoted by the appellants.

S. REP. No. 744, 90th Cong., 1st Sess. 164-65 (1967).

for the cost of providing a home for the child." S. REP. No. 744, 90th Cong., 1st Sess. 164 (1967). The committee then stated that it "believed that *greater use* could be made of these present provisions of the AFDC program in this respect," *i.e.*, the provisions providing for relative care of foster children. And in the next two sentences it specified the two measures under the Committee bill which would result in "greater use" of relatives *as foster parents*. First, federal sharing for *Foster Care* benefits would be made higher than sharing for basic AFDC benefits, thus encouraging the states to pay higher benefits to Section 408 foster parents (including relatives) than to caretakers under the basic program. Second, the program would be mandatory in all states participating in the basic AFDC program; thus, the anticipated higher Foster Care benefits would be extended to (relative) foster parents in all states, not just in the minority of states then choosing to participate in the program. The payment of *higher Foster Care* benefits in *all* states would enable the "greater use" of relatives as Section 408 foster parents, than the existing law made possible.

The state officials' reliance on the referenced paragraphs, State Brief at 24, is therefore misplaced. The Committee is setting forth two provisions "under the Committee bill" which, *inter alia*, would encourage "greater use" of relatives as Section 408 foster parents in all states. To read the report otherwise, makes the Committee statement that "greater use could be made" of the provisions for relative care of foster children, precatory, and unrelated to the two sentences immediately following.



## VII.

## THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE'S ADMINISTRATIVE CONSTRUCTION OF SECTION 408 OF THE SOCIAL SECURITY ACT AUTHORITATIVELY SUPPORTS THE CONCLUSION THAT ILLINOIS CANNOT DENY AFDC-FOSTER CARE ELIGIBILITY TO OTHERWISE ELIGIBLE FOSTER CHILDREN SOLELY BECAUSE IT PLACES THEM IN THE HOMES OF RELATIVES.

In vacating the original three-judge Court opinion in this case, this Court, referring to HEW's position on the question of statutory construction presented here, stated that the "interpretation of a statute by an agency charged with its enforcement *is a substantial factor* to be considered in construing the statute." 425 U.S. 231, 235 (1976), citing, *inter alia*, *New York State Department of Social Services v. Dublino*, 413 U.S. 405, 421 (1975) (emphasis added). This Court has consistently adhered to the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong," *Red Lion Broadcasting Corp. v. F.C.C.*, 395 U.S. 367, 381 (1969), even if the agency's interpretation is not the only reasonable one, *Udall v. Tallman*, 380 U.S. 1, 16 (1965). Moreover, this Court has deemed administrative agency interpretations to be especially persuasive where the agency has proposed the provision's enactment to Congress, *United States v. American Trucking Ass'n*, 310 U.S. 534, 549 (1940), where the agency has "cooperated in developing" it, *Adams v. United States*, 319 U.S. 312, 315 (1943), or where the interpretation is a matter of "public record," *Udall v. Tallman*, 380 U.S. 1, 17-18 (1965), so that Congress may be presumed to have acted to correct the interpretation if it disagreed. Here HEW was involved in proposing the Foster Care Program, and certainly cooperated in its development. *See* pp. 17-19, *supra*. Moreover, HEW's

administrative construction has been a matter of public record. HEW Program Instruction APA-PI-75-9 (1974); *Youakim v. Miller*, 425 U.S. 231, 235 (1976).

HEW's relevant interpretation of Section 408 is clear, unequivocal, and "focus[es] closely on the operative impact" of the provision at issue in this action. *Weinberger v. Salfi*, 422 U.S. 749, 758 n.6 (1975). It wholly supports the foster children's position. HEW Program Instruction APA-PI-75-9 (1974) (A. 48.).

HEW's Program Instruction was issued "to resolve the problem of some states not licensing or approving the homes of non-legally liable relatives as foster care homes even though suitable foster care could be provided in the homes." *Id.*[42] It was the agency's "first and only" explicit national pronouncement on the question presented here. Brief for the United States as Amicus Curiae at 49. *See Great Northern R. Co. v. United States*, 315 U.S. 262, 275 (1942). But it by no means represented a departure from the agency's previous official operative interpreta-

[42] The Instruction was also issued in light of two federal district court decisions, referred to in the Instruction, which had ruled state policies excluding otherwise eligible children placed in relative homes from Foster Care eligibility to violate the Act. The two decisions were *Clampett v. Madigan*, S.D.S.D., decided May 24, 1973 (1972-74 T.B.), CCH Pov.L.Rptr. ¶ 17,-979, and *Jackson v. Ohio Department of Public Welfare*, N.D. Ohio, Civil No. C 72-182, decided April 17, 1972 at Motion to Affirm, A. 30. Since these two decisions, several other courts, in addition to the district court and Court of Appeals below, have reached the same conclusion, *Jones v. Davis*, D. Ore., Civil No. 76-805, decided January 31, 1977 [at Motion to Affirm, A. 13], appeal docketed, 9 Cir., no. 77-2254; *Thompson v. Department of Health and Social Services*, Cir. Ct. Wisc., decided January 9, 1976 [1974-76 T.B.], CCH Pov.L.Rptr. ¶ 22.303; *Alston v. Department of Health and Social Services*, Cir. Ct. Wisc., decided January 21, 1976 [1974-76 T.B.], CCH Pov.L.Rptr. ¶ 22,336; *see also Taylor v. Dumpson*, 362 N.Y.S.2d 888 (Sup.Ct. 1974), *rev'd. on other grounds* (mootness), 37 N.Y.2d 765 (1975). *Cf. Sockwell v. Maloney*, 431 F.Supp. 1006 n.3 (D. Conn. 1976) (Dicta), *aff'd.* 554 F.2d 1236 (2d Cir. 1977). There is no contrary judicial authority.



tion of the Act; on the contrary, it was issued expressly to enforce existing HEW policy in recalcitrant states, not to promulgate new policy for all states.[43] Thus, as the Solicitor General notes in his Brief at 18-19, HEW had informed individual states prior to 1974 that otherwise eligible children placed in relative homes were eligible for the Foster Care Program, and funded Foster Care benefits paid to such children.

While the state officials dispute HEW's interpretation of the Act, their arguments suggest the weakness of the state's position and reinforce the proposition that HEW's construction of the Act is entitled to substantial weight here. First, the state officials assert that HEW's position

[43] The state officials point to a 1971 letter of an acting regional commissioner of HEW's Social and Rehabilitation Service to one of the Division heads of the Illinois Department of Public Aid, as representing a previously contrary interpretation of the Act. State Brief at 32-33. But as the Solicitor General notes, Brief for the United States as Amicus Curiae at 18, the local HEW official wrote this letter without approval from HEW's General Counsel's office or from "any Department official in the national office." *Id.* The letter did not represent HEW's official policy, as applied nationally. *Id.*, at 18-19. The state officials' reliance on this deviant interpretation of national policy by a local official to undermine the authority of the HEW Program Instruction, citing *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), is therefore misplaced. In *Gilbert*, this Court held that where the Equal Employment Opportunity Commission ("EEOC") was given no authority to promulgate rules and regulations pursuant to Title VII of the Civil Rights Act of 1964, an EEOC guideline prohibiting exclusion of pregnancy-related disabilities from coverage under private health insurance plans was not entitled to great deference, especially when two earlier official opinion letters issued by EEOC's General Counsel's Office enunciated a contrary position. *Gilbert*, 429 U.S. at 141-43. Even then, that Court refused to "wholly discount the weight to be given the [later] 1972 guideline." *Id.*, at 143. Here, Congress has given HEW specific authority to issue "rules and regulations" governing the AFDC program, § 1102, 42 U.S.C. § 1302 (1970), and there is no contrary policy interpretation from HEW's General Counsel's office, or from anyone else with authority to promulgate official national HEW policy.

"does not derive support from its own published regulations." State Brief at 33. Since HEW has specifically stated that its own regulations not only "support" the policy of requiring foster children living with related foster parents to be eligible for Foster Care benefits, but *require* it, HEW Program Instruction APA-PI-75-9 (1974), this argument carries no weight. *See Udall v. Tallman*, 380 U.S. 1, 16 (1965).[44]

Second, the state officials suggest that Section 408 itself is "unclear," State Brief at 22, or "ambiguous," Jurisdictional Statement at 11, and that it is both "necessary and appropriate" to construe Section 408 in light of "other sections of the federal welfare scheme." The foster children do not accept the state officials' characterization of the statutory language. But it is, of

[44] In any event, the inferences the state officials draw from the regulations which they discuss at State Brief, 34-36, are of no help to their case. Appellants characterize as "especially significant" 45 C.F.R. §§ 233.90(c)(1)(v)(B)(1), (2), which provides federal funding under the regular AFDC program for children living with specified relatives even while such children are under the court or state agency jurisdiction. From this regulation, the state infers that HEW is distinguishing between all children placed with relatives (including those under state custody) and all children not placed with relatives. But there is a large group of children removed from their own homes and under state agency control who—whether they live with relatives or non-relatives—are not eligible for foster care under § 408. These are children who were not eligible for regular AFDC in the homes from which they were removed; 45 C.F.R. § 233.90(c)(1)(v)(B)(1), (2), merely describes regular AFDC eligibility for those children. Similarly the conclusions they draw from 45 C.F.R. § 233.90 (c)(1)(v)(A)(1) merely reiterate their contention that because the children would be eligible for the regular AFDC program, they cannot be eligible for the Foster Care Program. The conclusion they draw from 45 C.F.R. § 220.19 repeats the argument derived from § 408(f)(1). Finally, appellants attach some significance to 45 C.F.R. § 233.90 (c)(2)(i) and (iii), prohibiting the "double-counting," for federal reimbursement purposes, of children receiving regular AFDC benefits and Foster Care benefits in the same month. This regulation tracks § 408(c) which, as explained at n. 38, *supra*, inferentially supports the foster children's position.



course, precisely "where the relevant statutory language is unclear or susceptible of differing interpretations," *Shea v. Vialpando*, 416 U.S. 251, 262 n.11 (1974), that this Court finds it appropriate to consider and defer to federal administrative agencies' interpretations of the statutes they are charged with executing. *See Udall v. Tallman*, 380 U.S. 1, 16 (1965). With respect to the state officials' suggestions that Section 408 must be construed with other provisions of the Act, HEW's interpretative effort to "harmonize an obscure enactment with the basic structure of the program it administers" has been accorded great respect by this Court. *Rosado v. Wyman*, 397 U.S. 397, 415 (1970).

HEW's interpretation of Section 408 of the Act authoritatively supports the Judgment of the Court of Appeals.

## CONCLUSION

The Judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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# INDEX TO SUPPLEMENT


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- Section 402(a)(19)(F), 42 U.S.C. §602(a)(19)(F) (1970 & Supp. V 1975) ..... S-1
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# SUPPLEMENT

U.S. CONST. art. VI, cl. 2, the Supremacy Clause:

> This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and judges in every state shall be bound thereby, any thing in the constitution or laws or any state to the contrary notwithstanding.

Social Security Act of 1935, Title IV, 49 Stat. 627, 42 U.S.C. §601 *et seq.* (1970 & Supp. V 1975):

Section 402(a)(10), 42 U.S.C. §602(a)(10) (1970 & Supp. V 1975):

> A State plan for aid and services to needy families with children must:
>
> • • •
>
> (10) provide, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals. . . .

Section 402(a)(19)(F), 42 U.S.C. §602(a)(19)(F) (1970 & Supp. V 1975):

> A State plan for aid and services to needy families with children must:
>
> • • •

*(Supplement)*

(19) provide—

• • •

(F) that if and for so long as any child, relative, or individual (certified to the Secretary of Labor pursuant to subparagraph (G)) has been found by the Secretary of Labor under section 633(g) of this title to have refused without good cause to participate under a work incentive program established by part C with respect to which the Secretary of Labor has determined his participation is consistent with the purposes of such part C, or to have refused without good cause to accept employment in which he is able to engage which is offered through the public employment offices of the State, or is otherwise offered by an employer if the offer of such employer is determined, after notification by him, to be a bona fide offer of employment—

(i) if the relative makes such refusal, such relative's needs shall not be taken into account in making the determination under clause (7), and aid for any dependent child in the family in the form of payments of the type described in section 606(b)(2) of this title (which in such a case shall be without regard to clauses (A) through (E) thereof) or section 608 of this title will be made;

(ii) aid with respect to a dependent child will be denied if a child who is the only child receiving aid in the family makes such refusal;

(iii) if there is more than one child receiving aid in the family, aid for such child will be denied (and his needs will not be taken into account in making the determination under clause (7)) if that child makes such refusal; and



*(Supplement)*

(iv) if such individual makes such refusal, such individual's needs shall not be taken into account in making the determination under clause (7);

except that the State agency shall, for a period of sixty days, make payments of the type described in section 606(b)(2) of this title (without regard to clauses (A) throuh (E) thereof) on behalf of the relative specified in clause (i), or continue aid in the case of a child specified in clauses (ii) or (iii), or take the individual's needs into account in the case of an individual specified in clause (iv), but only if during such period such child, relative, or individual accepts counseling or other services (which the State agency shall make available to such child, relative, or individual) aimed at persuading such relative, child, or individual, as the case may be, to participate in such program in accordance with the determination of the Secretary of Labor;

Section 425, 42 U.S.C. §625 (1970):

For purposes of this subchapter, the term "child-welfare services" means public social services which supplement, or substitute for, parental care and supervision for the purpose of (1) preventing or remedying, or assisting in the solution of problems which may result in, the neglect, abuse, exploitation, or delinquency of children, (2) protecting and caring for homeless, dependent, or neglected children, (3) protecting and promoting the welfare of children of working mothers, and (4) otherwise protecting and promoting the welfare of children, including the strengthening of their own homes where possible or, where needed, the provision of adequate care of children away from their homes in foster family homes or day-care or other child-care facilities.

*(Supplement)*

Department of Health, Education and Welfare Information Memorandum APA-IM-71-7 (April 22, 1971):

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D. C. 20201

*INFORMATION MEMORANDUM*
APA-IM-71-7
April 22, 1971

TO: STATE AGENCIES ADMINISTERING APPROVED PUBLIC ASSISTANCE PLANS

SUBJECT: AFDC-FC Clarification of the Meaning in Section 408 of the Social Security Act of the Licensing or Approval of Foster Family Homes.

CONTENT: See Attached Material

OTHER INFORMATION: The existing regulations on this subject are codified in Title 45, Chapter II, Part. 233.110 of the Code of Federal Regulations.

INQUIRIES TO: SRS Regional Commissioners

/s/ John L. Costa
Commissioner
Assistance Payments
Administration



*(Supplement)*

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D. C. 20201

AFDC-FC Clarification of the Meaning in Section 408 of the Social Security Act of the Licensing or Approval of Foster Family Homes

This is to clarify the meaning in section 408 of the Social Security Act of the statement: "For the purposes of this section, the term 'foster family home' means a foster family home for children which is *licensed* by the State in which it is situated or has been *approved,* by the agency of such State responsible for licensing of homes of this type, as meeting the standards established for such licensing." (Emphasis supplied.) In order to interpret this provision, it must be read in context with the other related provisions of the Act.

Section 402 (a)(20) requires every State AFDC plan to provide, effective July 1, 1969, for AFDC in the form of foster care in accordance with section 408. This means that all those who meet the expanded definition of "dependent child" contained in section 408 (a) and who are otherwise eligible must be considered eligible for AFDC-FC under the State plan.

This requirement, combined with the Statewideness requirement in section 402 (a)(1), means that the agency must place every child applying for AFDC-FC who meets the definition in section 408 (a) realistically on a Statewide basis. The agency must, therefore, have foster homes available for the eligible children whose placement and care are its responsibility.

*(Supplement)*

The agency may not escape its obligations under these statutory provisions by failing to license foster homes. Nor may the agency escape its obligation to comply with title VI of the Civil Rights Act of 1964 by refusing to license homes of those of a particular race, color, or national origin. If a child is eligible for AFDC-FC under section 408 (a), the State agency is required under section 402 (a)(20) to provide assistance for the child. If the child is living in a home which is not licensed or approved as defined in section 408, then the State will receive no Federal share under title IV-A in the assistance furnished the child, but the State is still required under its plan under IV-A to provide assistance with or without Federal financial participation for the child.

The above-cited definition of a "foster family home" describes such a home as one that has been licensed or approved. Therefore, the State does not have to license a home in order to receive a Federal share in assistance in behalf of a child living there. If a home may not be licensed under State law, the State licensing authority may approve a home as meeting the licensing standards and the State would then receive Federal matching in assistance to eligible AFDC foster children residing in that home.





*(Supplement)*

ILL. REV. STAT. ch. 23, §2217 (Supp. 1977):

(a) The Department must prescribe and publish minimum standards for licensing that apply to the various types of facilities for child care defined in this Act and that are equally applicable to like institutions under the control of the Department and to foster family homes used by and under the direct supervision of the Department. The Department shall seek the advice and assistance of persons representative of the various types of child care facilities in establishing such standards. The standards prescribed and published under this Act take effect as provided in "An Act concerning administrative rules", approved June 14, 1951, as amended, and are restricted to regulations pertaining to:

(1) The operation and conduct of the facility and responsibility it assumes for child care;

(2) The character, suitability and qualifications of the applicant and other persons directly responsible for the care and welfare of children served;

(3) The general financial ability and competence of the applicant to provide necessary care for children and to maintain prescribed standards;

(4) The number of individuals or staff required to insure adequate supervision and care of the children received;

(5) The appropriateness, safety, cleanliness and general adequacy of the premises, including maintenance of adequate fire prevention and health standards conforming to State laws and municipal codes to provide for the physical comfort, care and well-being of children received;

(6) Provisions for food, clothing, educational opportunities, program, equipment and individual sup-

plies to assure the healthy physical, mental and spiritual development of children served;

(7) Provisions to safeguard the legal rights of children served;

(8) Maintenance of records pertaining to the admission, progress, health and discharge of children;

(9) Filing of reports with the Department;

(10) Discipline of children;

(11) Protection and fostering of the particular religious faith of the children served.

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DCFS, CHILD WELFARE MANUAL 2.8.2 (1976):

When a relative home is being considered as a placement resource, the home must meet the minimum standards for foster family homes, although the home is not subject to licensing.

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